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JAMES H. McKENN

Supreme Court of the United States

CHOCTAW, OKLAHOMA AND GULF
RAILROAD COMPANY.. .. .. *Plaintiff in Error.*

v. No. ~~251~~ 67

THOMAS TENNESSEE.. .. .. .. *Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

EDWARD B. PEIRCE,
Attorney for Plaintiff in Error.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

Supreme Court of the United States

CHOCTAW, OKLAHOMA AND GULF
RAILROAD COMPANY.. .. .. *Plaintiff in Error.*

v. **No. 351**

THOMAS TENNESSEE.. .. .. .. *Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

This case was originally instituted in the Circuit Court of Pulaski County, Ark., and removed by the defendant to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, on the ground of the Federal character of the defendant company (Tr., pp. 5, 6).

The **COMPLAINT** (Tr., p. 3) charged that on the 6th day of February, 1900, the plaintiff was engaged as a brakeman on a freight train of the defendant, and was engaged

in his duty as such in the town of Argenta, Ark., and as such was riding on the front end of the engine of freight train No. 13, headed into the yards of said railroad.

That at the place where plaintiff was then engaged in the performance of his duty, there was a step on what is known as the "cowcatcher," where plaintiff, in the performance of his duty, was accustomed to step; that in the performance of said duty, he placed his foot upon said step, and the said step, by reason of being in a weak or unstable condition, gave way and thereby precipitated him onto the ground, where he became entangled in the ties of said railroad company and the said train ran over his left leg and bruised and mangled the same, so that he was compelled to have it amputated near the body.

That the defendant was negligent in the construction of said step, and was negligent in permitting it to stay in a faulty and unfirm condition; that the condition of said step was unknown to this plaintiff.

That said railroad was operating said train over a track where the ties stood up some fifteen inches from the ground, and thus made a mantrap into which plaintiff was thrown; that if said ties had been properly filled in when plaintiff fell onto the track of same, he might have escaped uninjured, but by reason of the negligent construction of said track, plaintiff was caught in between the same and thereby suffered the loss of his leg as aforesaid. The plaintiff was just beginning to run into the new yard and upon the new track, and its dangerous condition was unknown to plaintiff.

That by reason of the negligence of the defendant, plaintiff suffered great bodily suffering and severe mental anguish, and lost the use of his limb, to his damage in the sum of Five Thousand Dollars.

The **ANSWER** (Tr., p. 9) specifically denied each of the material allegations of the complaint, and in addition thereto, alleged that plaintiff was attempting to step upon the front end of said engine, and that the act of attempting to ride upon said front end of said engine was unnecessary, careless and improper on the part of said plaintiff, and in the discharge of his duty he was not required, nor was it necessary for him to attempt to so ride, and in attempting to do so he was violating the rules of the said defendant company; and further that if the plaintiff was injured as alleged in his complaint, said injury was occasioned by his own carelessness and negligence and without any fault on the part of the defendant.

STATEMENT OF FACTS.

The record in this case disclosed that about the 1st of December, 1899, the Choctaw, Oklahoma and Gulf Railroad Company took possession of and commenced to operate what had prior thereto been known as the Memphis and Little Rock Railroad, running from Little Rock to Memphis. About this time, there was a general reconstruction of the line, such as putting in new yards, enlarging terminal facilities, working on many of the bridges, widening and raising the dumps; in fact, so extensive were the improvements begun, that it practically resulted in making a new road from Memphis to Little Rock. Among these improvements was the enlargement of the terminal facilities in that part of Little Rock known as Argenta. This particular work consisted principally in laying out and constructing an entirely new yard, which is shown on the blue-print (Tr., pp. 66, 67), and explained by witness McAvoy in his testimony (Tr., pp. 64, 65). These new yards had been laid out, the rails had been

spiked to the cross-ties, and the tracks surfaced up, but the spaces between the ties had not yet been filled in. The road began to use this new yard about the middle of December, 1899.

Among the persons employed by the plaintiff in error was the defendant in error, Thomas Tennessee, who was thirty-three years old. He had been engaged in railroading for twelve or fifteen years in the capacity of brakeman and switchman, and during that time had worked for seventeen or eighteen different roads. On the night of February 6, 1900, he was employed as head brakeman on Train No. 13, which was the local freight running that day from Hopefield, opposite Memphis, to Little Rock. This train arrived in the yards at Argenta at about 10 o'clock at night. Tennessee alighted from the train and went forward to turn the switch from the main track to the lead track of the new yards. It was his business to find a track in the yards to head his train on. He passed down in front of the engine until he came to the third track, and decided to put his train in on that track. He "lined" up the third track to the lead track, and signaled the engineer to come ahead. The engine was equipped with an electric headlight, which was very brilliant, and Tennessee stated that it blinded him. Tennessee also had his lantern in his hand, and after he had signaled the train to come ahead, took his position just inside of the rail, pulled his hat down over his eyes to keep the electric headlight from blinding him, so that the line of his vision was brought just about the top of the pilot of the engine. He took this position to get on a small iron step, four inches wide by eighteen inches long, bolted to the bottom of the pilot or cowcatcher, on the right-hand, or engineer's side, of the engine, and slanting across the

track with the pilot, as the engine approached him. As the engine approached, Tennessee attempted to get on, but for some reason or other, did not succeed, and he fell just in front of the engine, and his left leg was caught and bruised and mangled, so that he was compelled to have it amputated. Upon a trial of the case, the jury returned a verdict in favor of the plaintiff for $5,000.

ASSIGNMENT OF ERRORS.

The plaintiff in error relies upon the following errors for the reversal of this case:

1.

The verdict of the jury is contrary to the instructions of the court.

2.

The verdict of the jury is contrary to the evidence.

3.

The verdict of the jury is contrary to the evidence and instructions of the court.

4.

The court erred in refusing the peremptory instruction asked by the defendant, which was in words as follows: "The court instructs the jury that under the evidence in this case the plaintiff cannot recover and your verdict will be for the defendant."

5.

The court erred in giving that part of its charge to the jury in words as follows: "What it owes to its employees is to furnish machinery in a reasonably safe condition and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable

in damages for any injury sustained by the servant while in the discharge of his duties if the servant's own acts or negligence do not contribute to the accident."

6.

The court erred in giving that part of its charge to the jury in words as follows: "Now, as a general rule where the tracks are in large railroad yards, where there is a great deal of traffic going on, and where a great many employees walk to and fro in crossing the track, a company is required to use more diligence and keep the tracks in a better condition than it would out in the country where no one ever passes over them."

7.

The court erred in giving that part of its charge to the jury in words as follows: "Contributed in any considerable degree to his injury."

8.

The court erred in giving that part of its charge to the jury in words as follows: "Now, if the plaintiff jumped on the engine at the time of the accident in the proper discharge of his duty, that is, if it was his duty to get on the front end of the engine while in motion, or if he had been in the habit of being directed to do so by his superior officers whose command he was bound to obey, and by reason of the fact that either the plate broke or gave way and he was injured, or even if he did not slip or it gave way, but that he slipped by reason of the fact that the weather was bad, and he fell and was injured, and the injury was caused by the fact that the track had not been filled up between the cross-ties, and you further find that under the evidence and the law as I

explained it to you, a failure on the part of the railroad company to fill it up was negligence, then he would be entitled to recover."

9.

The court erred in permitting the plaintiff to testify as follows:

"Q. Do you know anything about the condition of the step before this accident occurred? Immediately before this accident, when this accident occurred, can you say just what condition it was in at that time?

"Court: Do you know what condition it was in immediately afterwards?

"A. I couldn't say what condition it was in.

"Q. Do you know what condition it was in a short time afterward?

"A. A short time afterward it wasn't there.

"Q. Then you don't know the condition of the step at the time of the accident?

"A. I can't say what condition it was in.

"Mr. Blackwood: Did you see it early next morning?

"A. Early next morning I went down and looked at the engine and the piece had been removed."

10.

The court erred in permitting the plaintiff to answer the following questions:

"Q. Do you know what is the customary and safe way to fix yards?

"A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there

will not be any holes or nothing for a man's foot to get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule."

11.

The court erred in permitting the witness Wesley Graves to testify as follows:

"Q. You were on the stand awhile ago. I will ask you when you saw this step next before this accident occurred to Tom Tennessee?

"A. I seen it the last trip I was out with the engine and cautioned my brother not to try to catch on that pilot, that the foot plate was loose on it."

12.

The court erred in permitting the witness Wesley Graves to testify as follows:

"Q. Could the inspector have found out the condition of the step if he had inspected it?

"A. Yes, sir."

13.

The court erred in permitting the witness Wesley Graves to testify as follows:

"Q. Did you see it any more after you saw it the next morning after Tom was injured?

"A. I never seen it no more. The next morning I went down there through the yards and the piece had been removed.

"Q. Wasn't on there at all?

"A. No, sir."

14.

The court erred in permitting the witness Wesley Graves to testify as follows:

"Q. Were you in the habit of doing it?

"A. Yes, sir; I always do it. I do it up till this day."

15.

The court erred in refusing to permit the witness A. McAvoy to answer the following question:

"Q. Were those other yards used in the same condition as this yard was used in?"

16.

The court erred in permitting the plaintiff to testify as follows:

"Q. How were those yards fixed up before they were in general use?

"Court: A large yard such as this is and where the ground is such as it is here, are freight trains permitted to run into it before it is completed or not?

"A. No, sir; they were not allowed to go in.

"Court: The question is not what was done in any one yard, but do you know how yards of this kind are run and how they are managed?

"A. Yes, sir.

"Court: Can you state that freight trains are not permitted to go into yards until everything is completed?

"A. All that I ever seen. They would fill them in and not have them ready for use until the tracks were filled in with gravel or something.

"Court: State in what manner you helped. Did you superintend the building of them, laying them out and planning them?

"A. No, sir.

"Court: Just worked as a common laborer?

"A. I worked as a common laborer and helped lay steel and ties.

"Counsel for plaintiff: You say you have had experience in helping to build at least three yards?

"A. Yes, sir.

"Q. Were they larger or smaller than the yards over here?

"A. Two of them were larger and one of them was about the same size.

"Q. What was the difference in the ground, or soil, from which these yards were built and the soil here?

"A. There wasn't any. It was all graded down.

"Q. Was that a sandy soil, an alluvial soil, a soil like this, or was it a rocky foundation?

"A. No, sir; it was solid dirt.

"Q. Dirt something similar to this over here where this yard was built?

"A. Yes, sir; I suppose so.

"Q. Have you ever had any occasion, from your own experience in the railroad business, to notice the drainage or settlement of dirt around the ties, how it affects a road when it is newly built, how it should be built in order for it to drain successfully, and in order for it to settle quickly? Have you had observation; do you know anything about that?

"A. Yes, sir.

"Q. Now, then, what, in your opinion, would be the proper way to construct the yard so as to make the drainage successful and so as to get the yard in a good and proper condition as soon as practicable?

"A. I have worked several gangs on the tracks that way myself, and I always would fill in the track and fill it up with gravel.

"Court: The question is about a new yard.

"A. Fill it in with gravel where it is newly laid, then as it settles work this gravel in under it. It will make the track more substantial than it would by just leaving the ties lying on the ground and heaping a little dirt in the center to hold it. We have always filled up the ties and left the ends of the ties on a gradual slope, like that, so that when it rains the water can drain off the ends of the ties."

17.

The court erred in refusing to give defendant's instruction No. 1, in words as follows:

"The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured and that the injury resulted from a defect in the step, but he must go further and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step."

18.

The court erred in refusing to give defendant's instruction No. 2, in words as follows:

"One of the contentions in this case is that there was no defect in the step which the plaintiff alleges caused the

injury. The contention of the defendant is that the step was in a sound condition and perfectly safe. The court instructs the jury that if they find from the evidence that the said step was not defective or unsafe and that plaintiff, Tennessee, in attempting to mount the same while the engine was moving toward him and by reason of his foot's slipping or by reason of having lost his balance or by reason of having missed the step altogether, and suffered the injury complained of, he cannot recover."

19.

The court erred in refusing to give defendant's instruction No. 3, in words as follows:

"You are also instructed that even if said step was defective and the plaintiff knew, or had reasonable opportunity to know, of the same, and still attempted to step thereon, and was injured, he cannot recover."

20.

The court erred in refusing to give defendant's instruction No. 4, in words as follows:

"The court instructs the jury that even though they believe from the evidence that the step to the pilot was defective and dangerous and the plaintiff was injured thereby as alleged, yet if the jury believes from the evidence that the plaintiff negligently or without ordinary care and caution got upon defendant's track, or on the side thereof, in front of the approaching engine and negligently or without ordinary care and caution, attempted to step upon the foot board in question, and in doing so slipped and was run over by the engine and injured, then the plaintiff cannot recover.

"And in determining what was ordinary care on the part of the plaintiff in this case, you will take into consideration all the surrounding circumstances, such as the size of the step, the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, the fact that the engine had an electric headlight that blinded plaintiff, the condition of the track, the fact that plaintiff had only two fingers on one hand and it would therefore be more difficult for him to catch himself in case of a misstep or fall, the fact that the night was cloudy and dark, and all other facts of a similar character disclosed by the evidence."

21.

The court erred in refusing to give defendant's instruction No. 5, in words as follows:

"The court instructs the jury that if the plaintiff knew of the condition of the footboard in question at the time of the injury complained of, and negligently went upon defendant's track in front of the approaching engine in order to step upon the said footboard, and his foot slipped and he became entangled in the ties and was unable to extricate himself therefrom before the occurrence of the injury, and he was thereby injured, then he was guilty of negligence and cannot recover."

22.

The court erred in refusing to give defendant's instruction No. 6, in words as follows:

"The court instructs the jury that under the evidence in this case the plaintiff assumed all the risks incident to the condition of the cross-ties on defendant's roadbed at the place of the injury, and if you find from the evidence that the

alleged condition of the cross-ties produced the injury, you will find for the defendant."

23.

The court erred in refusing to give defendant's instruction No. 7, in words as follows:

"The court instructs the jury that the plaintiff was bound to notice the defect in the track of which he complains if, in the discharge of his duty, he had an opportunity to notice the same, and if he did have such an opportunity the law presumes conclusively that he did have knowledge, and if after he observed or had opportunity to observe the defect he was injured at said point by reason of said defect, he cannot recover."

24.

The court erred in refusing to give defendant's instruction No. 8, in words as follows:

"The court instructs the jury that if the evidence in this case shows that plaintiff had, at or about the time he attempted to get on the step of the pilot, an opportunity to observe the condition of the ties between the rails where he attempted to get on, and that after having such knowledge, or the means of acquiring the same, and the danger of attempting to get on there being apparent, and he then attempted to get on said step, he assumed all risks of accident or danger incident to the condition of said ties, and he cannot recover by reason of the condition of the ties."

25.

The court erred in refusing to give defendant's instruction No. 9, in words as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous or imprudent for plaintiff to get upon said step while the engine was moving toward him, and it was within the power of said plaintiff by proper signals to have said engine stop before attempting to mount the same, and the plaintiff failed to have said engine stop before attempting to mount, and slipped and fell in so attempting to mount, whether the said accident was due to any defect in the step or not, then the plaintiff was guilty of contributory negligence and cannot recover."

26.

The court erred in refusing to give defendant's instruction No. 10, in words as follows:

"The court instructs the jury that one of the alleged grounds upon which plaintiff is seeking to recover in this action is the fact that the cross-ties in defendant's switch yard had not been filled in and that they were standing some fifteen inches above ground. The court instructs the jury that if they find from the evidence that the defendant's switch yard at the point where plaintiff was injured was in the condition alleged by plaintiff and had been in the same condition at the same time of the injury and for several months prior thereto, and that plaintiff had been in defendant's employ for some time prior thereto, and had passed along and through said switch yard on defendant's tracks frequently, and had had an opportunity by the exercise of ordinary care to have known the condition of the said switch yard and the likelihood of danger at the said point, and continued in the employ of the defendant, you are instructed that said plaintiff thereby assumed all risks and hazards of accident resulting from the

alleged negligent condition of defendant's track, and he cannot recover and you will find for the defendant.

"And on this point, the court instructs the jury that the master may conduct his business in his own way, although such methods may be more than ordinarily hazardous, and the servant assumes the extra risks and perils by continuing in the employ of the master when he has knowledge of the master's methods, either actual or presumed. And the court instructs the jury that where the defect, or danger, is obvious, as in this case, knowledge is presumed on the part of the plaintiff of the dangers which it suggests and which are apparent."

27.

The court erred in refusing to give defendant's instruction No. 11, in words as follows:

"The court instructs the jury that even if you find from the evidence that it was necessary for the plaintiff to ride upon the step in question in the discharge of his duty, and it was in the power of the plaintiff to have said engine stop before mounting said step, and he undertook to mount while the engine was in motion, rather than signal it to stop, then he was guilty of contributory negligence and cannot recover."

28.

The court erred in refusing to give defendant's instruction No. 12, in words as follows:

"If the jury find from the evidence that the railroad company had established and promulgated a rule for the protection of brakemen, which warns and prohibits them from

getting or stepping on the front end of engines as they approach them, and that the plaintiff attempted to step on the front end of the engine in violation of said rule and regulation, then you are instructed that the plaintiff was guilty of negligence and you will find for the defendant."

29.

The court erred in refusing to give defendant's instruction No. 13, in words as follows:

"If the jury believe from the evidence that the plaintiff got upon defendant's track, or near thereto, to step upon the footboard in question as said engine approached him, and in attempting to step upon said footboard he slipped from said footboard on to the track and was run over by said engine, then he was guilty of negligence and cannot recover."

30.

The court erred in refusing to give defendant's instruction No. 14, in words as follows:

"You are further instructed that although you find and believe from the evidence that the step in question was defective and the plaintiff thereby received the injury complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were intrusted with the duty of inspection, had notice of the fact that said step was defective prior to the time of the injury, or that the step was defective a sufficient length of time before the injury, that its condition could have been discovered by the defendant, or its inspectors, by the exercise

of reasonable care, and could not have been discovered by plaintiff by the exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant."

31.

The court erred in not instructing the jury to bring in a verdict for the defendant, for the reason that the record shows that the whole evidence was insufficient to support the allegations of the complaint.

The foregoing were the assignments of error filed in the circuit court (Tr., pp. 114, 122). In the Circuit Court of Appeals it was assigned as error that that court erred in not sustaining each of said assignments of error, and in addition:

The said Circuit Court of Appeals before which was heard the writ of error which brought up the record in this action from the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas to said Circuit Court of Appeals, erred in making its order affirming the judgment of said Circuit Court of the United States, and directing a mandate to issue to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, directing the said Circuit Court of the United States to proceed in accordance with the decision and order of said Circuit Court of Appeals.

That the said Circuit Court of Appeals erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said Circuit Court of the United States and in not directing a new trial of the issues raised by the pleadings in said action.

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BRIEF.

The defendant in error in this case bases his right to recover upon two distinct grounds of negligence: first, the alleged defective condition of the step attached to the pilot or cowcatcher of the engine, which he was seeking to mount at the time of his injury, and second, the alleged defective condition of the track in not having the spaces between the cross-ties filled in with dirt at the place where the injury occurred.

The mere fact that the step in question may have broken off (which is not admitted) when the plaintiff undertook to mount it, does not, in itself, constitute negligence. The step must have been in a defective condition by reason of the negligence of the railroad company in failing to exercise ordinary care to provide a safe step, or if it had provided a safe step to use ordinary care in discovering the fact that it had subsequently become loose and so defective as to render it dangerous to use. Even if these conditions had existed in this case, they did not furnish a sufficient ground for recovery, for the further reason that this act of negligence on the part of the railroad must have been the proximate cause of the injury. The plaintiff alleges in his complaint that, notwithstanding the step gave way and precipitated him to the ground, yet if the ties had been properly filled in when plaintiff fell he might have escaped uninjured, and that by reason of the negligent construction of said track plaintiff was caught in between the same and thereby suffered the loss of his leg. So that the right to recover in this case seems to be predicated almost entirely upon the condition of the track at the place of the

injury. The mere fact that the spaces between the ties were not filled in does not, of itself, necessarily make the railroad liable. It is not *per se* negligence to use a track in the condition in which this track is alleged to have been in, but conceding that the railroad company was negligent in both of these respects and that by reason thereof the plaintiff was injured, yet he cannot recover unless he was in the exercise of due care and caution himself and did not in any manner contribute to the injury, and was also ignorant of the dangerous conditions existing. We contend that the record in this case shows beyond any doubt that there was absolutely no negligence on the part of the defendant in either of the respects alleged, or in any other respect, but that the injury which plaintiff received was an assumed risk and was due solely to his own recklessness and carelessness, and we therefore now proceed to a discussion of the errors assigned, which will necessarily involve a thorough and complete review of the entire record of the case.

Notwithstanding the errors complained of in the charge of the court to the jury, we think that the charge in effect amounted to a peremptory instruction to the jury to return a verdict in favor of the defendant, and we can therefore properly consider the 1st, 2d, 3d, 4th, 22d, 29th, and 31st assignments of error together, and will embrace them in the argument which we now purpose to make upon the refusal of the court to instruct the jury to return a verdict for the defendant, which is the 4th assignment of error.

Alleged defective condition of step.

Turning to the transcript (p. 53) **THOMAS CUNEO**, engineer, testified as follows:

Q. When you started back — you were the engineer on that trip — where did you start from on your return trip?

A. From Hopefield, just across the river from Memphis.

Q. Did you inspect your engine before you left?

A. Yes, sir.

Q. Was that your business?

A. Yes, sir.

Q. Did you make a careful inspection?

A. Yes, sir.

Q. What was the condition of the step then?

A. It was all right.

Q. Did you inspect the step when you got in that night?

A. Yes, sir.

Q. After the accident?

A. Yes, sir.

Q. What was the condition of it then?

A. It was all right.

Q. After you had cut the engine off and looked at the step, it was all solid?

A. Yes, sir.

Q. Had Tennessee been on that step before on that day?

A. Yes, sir; he got on it at Forrest City going at about twelve miles an hour. A brakeman standing there hallooed at him and said: "What are you trying to do — get killed?" He rode about two or three car lengths at that time.

He also testified on cross-examination that it was his duty to inspect the engine at Hopefield (Tr., p. 57).

THOMAS TENNESSEE (Tr., p. 41) testified as follows:

Q. You said you were on that step two or three times that day?

A. I don't think I was on it more than once or twice.

Q. Did you notice anything wrong with the step then?

A. No, sir; I never had no idea of the step being loose and never paid any attention to it.

Q. If it had been loose, though, you would have detected it, wouldn't you?

A. Yes, sir; probably I might, but the engine was standing still one time when I got on it?

A. C. ROBKIN (Tr., p. 92), who was at that time master mechanic for the defendant railroad, stationed at Argenta, testified:

Q. Do you remember the time Tom Tennessee got his leg cut off?
A. Yes, sir.
Q. Where were you at that time?
A. I was at my office in Argenta.
Q. Is that at the roundhouse?
A. It is close to there.
Q. Were you there when the engine came in?
A. Yes, sir.
Q. Were you informed of this accident at that time?
A. I was informed of the accident when the engine rolled into the roundhouse.
Q. Were you informed how the accident occurred?
A. Yes, sir.
Q. What inspection did you make in view of the information you had received?
A. I looked over the pilot. The accident was from that part of the engine.
Q. Did you examine the step?
A. Yes, sir.
Q. What was the condition of the step?
A. The step was all right.
Q. Sound, was it?
A. Yes, sir.
Q. Are you in the employ of the company now?
A. No, sir.

MR. McKEISER (Tr., p. 83), machinist in the roundhouse at the time of the accident, testified that it was his duty to repair all engines that came in; that the next morning he repaired engine No. 5, on which Tennessee was injured, and that he worked on it for about six or seven hours; that he did not make any repairs on the step of the engine; that he had not made any repairs on the step any time within a few days before or within a few days after the accident; that he examined the step the next morning; that it was properly fastened

and in good condition, and as far as he could see it was perfect; that it was his exclusive business to do this work, and that there was no one else in the roundhouse at that time who could have done this work without his knowledge; that such work of this kind as was done on the engine was done by him.

HILLIARD GRAVES (Tr., p. 78) testified as follows:

Q. Were you on that step any time that day?
A. I remember getting on it once at Palestine.
Q. Is that east or west of Little Rock?
A. That's east of Little Rock.
Q. What occasion did you have for stepping on it?
A. We generally step on it to ride in. We were heading in.
Q. Did you get on there to make a coupling?
A. I got on there to ride in and make a coupling. We were heading in for the passenger train.
Q. What was the condition of the step at that time?
A. Well, it looked all right to me at that time.
Q. Did it feel all right?
A. I didn't pay much attention to it.
Q. Was that step in apparently sound condition?
A. Seemed to be to me; I didn't ride there far. I never made a practice of getting on the pilot.

JOE MEYERS (Tr., p. 69) testified that he was fireman on engine No. 5 at the time Tennessee was hurt; that next morning about 8 o'clock he stepped on the step and found that it was perfectly tight.

Turning again to the testimony of **THOMAS TENNESSEE** (Tr., p. 36), he testified as follows:

Q. When did you first find out that the step was defective?
A. I didn't ever know it was defective.
Q. Didn't you allege in your complaint that it was defective?
A. I said that in my judgment and knowledge it gave way with me. When a man is catching the pilot of an engine

he throws his foot up on the step and leans his whole weight on that foot until he gets hold of the top of the pilot. I got on it with my left foot and when I leaned over to get the top of the pilot it went right down with me.

Q. You don't know whether your foot slipped off or not?

A. I know that my foot went down. It didn't slip that way; it went straight down.

Q. You are just of the impression the step went off?

A. I don't know whether it went off or not; it gave way with me. At least, it went down.

Q. Did you see the step after that?

A. No, sir; I did not.

Q. You didn't examine it after that?

A. I couldn't examine it; I couldn't get around.

Q. Did you ever write Mr. Henry Wood, the vice president of the road, a letter about getting the injury?

A. Yes, sir.

Q. Did you make any complaint to him about any defect in the step?

A. No, sir.

Q. You merely told him in that letter that your foot slipped and you fell.

A. I told him that the step gave way and I slipped off it.

Q. What was it you said you wrote him?

A. I wrote him that I slipped off the step, but I didn't know how come me to slip off.

Q. You didn't tell him the step was defective, did you?

A. I don't just remember whether I told him the step was defective or not. I know I wrote him a letter concerning it, but I couldn't tell what's in the letter. It's been quite a long while.

Q. Is this the letter?

A. That's my handwriting.

(Defendant reads from said letter as follows:

"North Little Rock, Ark., July 30, 1900.

"*Mr. Wood, General Manager C., O. & G., and C. & M. R. R.*:

Dear Sir — On the 6th of February, 1900, I slipped off the front end of an engine, while heading in the yard on the north side, and lost my leg while performing my duty in the transportation department.")

Q. You say you never saw that step after that?
A. No, sir.
Q. When you got on that step, there was no handhold on that pilot?
A. No, sir.
Q. What did you grasp with your hands?
A. You can catch on the top of the pilot.

R. A. VAUGHAN (Tr., p. 48) testified: That at the time of the accident he was employed in the legal department of the Choctaw railroad; that he had a conversation with Tennessee at the hospital a short time after the accident; and that Tennessee told him that he slipped off the step; that Tennessee made a written statement at the time, which was as follows:

"My name is Tom Tennessee. I was brakeman on train No. 13, engine No. 5, west bound, on February 6, 1900. About 10 o'clock p. m., as we entered the yards at Argenta, I walked down and threw the first and second switches, and then in attempting to get on the pilot to ride down to throw the third switch the headlight blinded me. I jumped on the pilot as the train was running three or four miles an hour, and *my left foot slipped and fell between the pilot and the rail which threw me off of the pilot in front of the engine between the rails.* I rolled my body and right leg out of the track, but my left leg was caught and cut off just above the knee. I was not injured otherwise. The engine, after the first wheel hit my leg, made a good stop. I hallooed before that, but don't know whether he heard me. I don't think that he saw me or heard me either. At the time I was hurt it was raining and the pilot was slick. I have been braking fifteen or sixteen years, and have been hurt three other times in the service. I was on the engineer's side when I attempted to get on the pilot. Nobody saw the accident."

(Signed) THOMAS TENNESSEE.

HILLIARD GRAVES (Tr., p. 77), testified that he got to Tennessee about three minutes after he was hurt; Tennessee told him that he got on the footboard of the pilot and fell.

A. H. KILPATRICK (Tr., p. 91) testified that he had a talk with Tennessee about the accident after he got out of the hospital. That Tennessee told him that he went to get on the pilot and slipped.

JOE MEYERS says (Tr., p. 69) that Tennessee told him about ten minutes after the accident that he slipped off.

In his re-direct examination (Tr., p. 39), counsel for Tennessee tried to have Tennessee testify that at the time he wrote the letter to Mr. Wood he had not been able to make any investigation as to cause of his injury, but on re-cross examination (Tr., p. 40) he testified that he was just as fully advised at the time he wrote that letter as he was at the time of the trial.

It will thus be seen from the foregoing that there is absolutely not a particle of evidence to sustain any charge of negligence as to the step. On the contrary, the evidence establishes very clearly that the step was sound when the engine left Little Rock going to Hopefield, and that before the beginning of the return trip the engineer, whose duty it was to inspect this engine, inspected the step and found it in good condition. During the return trip Tennessee was on the step himself several times at different places, as was also the witness Hilliard Graves, and neither of them discovered anything wrong with the step. Immediately after the accident in the yards that night the engineer examined the step, found it in good condition; the master mechanic stated that he was waiting at the roundhouse for the engine to come in, and upon being informed of the accident, made an inspection of the step and found it in good condition, and

the roundhouse mechanic, whose business it was to make such repairs on engines, stated that he worked on this engine the next day for six or seven hours, during which time he examined the step and found it was in good condition. We contend that no reasonable mind can reach any other conclusion than that there was no defect in that step at all, and that Tennessee, in his written statement, made to Mr. Vaughan, and also in his statement to other witnesses at other times, that he attempted to get on this step and his foot slipped and he fell, told the absolute truth as to the occurrence. But, conceding that it could be in any way inferred from the evidence of Tennessee, that this step was defective, doesn't the evidence beyond any controversy show that the railroad company had used ordinary care in inspecting the engine, and that the step was in good condition? It was the engineer's duty at the Hopefield end of the line to inspect it before starting on his return trip, and he did so. Tennessee was on the step several times during the return trip, and if there was any defect in it, he had a better opportunity to find it out than anyone else. The only evidence introduced by Tennessee with reference to the step being loose, was the testimony of the witness, Wesley Graves. He testified (Tr., p. 24) that immediately before and immediately after the accident he could not say what condition it was in; that he saw the engine early next morning and the piece had been removed; that he saw this step the last trip he had made, which was several days before the accident, and that the footplate was loose (Tr., p. 41), and that he had cautioned his brother not to jump on that pilot. If it be

true that this step was loose several days before, it cannot be argued from that that it was loose on the occasion of the accident, because the evidence shows that the step was in good condition at that time, and further establishes the fact that the witness was either mistaken in his statement about this particular step, or that the step had been discovered in that condition and repaired.

The alleged negligence as to the condition of the track at the place of injury.

As we stated in the outset, it cannot be said, as a matter of law, that it is negligence to use a track before the spaces between the ties have been filled in. Upon this proposition there were but two witnesses introduced.

Tennessee (Tr., p. 30) testified as follows:

Q. Do you know what is the customary and safe way to fix yards?

A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there will not be any holes or nothing for a man's foot to get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule.

The railroad company, in order to disprove any charge of negligence on this point, introduced A. McAvoy, its road-master (Tr., pp. 60-63), who explained that it is usual for trains to be run over tracks in the condition in which these tracks were, as that is the only method they have of settling them, and this is usually done by new roads. He explained that when the tracks were first put in, it was necessary first, to do what is known as surfacing the track, that is, they haul dirt and throw it in the middle of the track so

that the dirt would slope back on either side from the center of the track out towards the rails, and this would not leave any dirt between the ties on either side of the track. That this process had to be gone through with in yards like this where it was necessary to get a foundation for the yards and establish a drainage before the tracks were filled in and ballasted. That after the yards were settled, they were then filled in and ballasted. That these yards were put in under his supervision, were built in the usual way and there had been no unnecessary delay in their construction or completion.

Wesley Graves (Tr., p. 43) testified as follows:

Q. Did you see the condition of those crossties at the time this accident occurred?

A. Yes, sir.

Q. What was the condition of them?

A. It was a new yard and the ties had just been laid and the rails spiked down and the track just surfaced up, but the track wasn't filled in; *none of the yard at all was filled in.*

This corroborates Mr. McAvoy as to the surfacing of the track.

To rebut the evidence of Mr. McAvoy, Tennessee took the stand (Tr., pp. 94-98), and undertook to give expert evidence as to how a yard should be constructed. His own evidence shows, however, that he was merely a day laborer; that he had never laid out and constructed yards himself, and that he had never commenced the construction of a yard and remained in charge and at work on them until they were completed. Furthermore there was nothing in his evidence to show that the same conditions in any respect existed as to the yards which he spoke of and the yards in controversy,

so that we say unquestionably that whatever experience he may have had elsewhere, or however competent he may have been to speak on the subject, could not be taken as any criterion as to whether the yards in question were properly constructed or not.

But, conceding, for the sake of argument, that the plaintiff established a clear case of negligence on the part of the railroad in the construction of this yard, it can avail the plaintiff nothing in this case for the following reasons:

1. The record shows conclusively that Tennessee knew the exact condition of the yard at that time.

2. That in attempting to get upon the step at this particular time, he was not in a place where his duties required him to be, and therefore the railroad company owed him no duty in respect to these yards at that particular time; and

3. That even if he had established actionable negligence with regard to the step and actionable negligence with regard to the condition of the yard, and that he was ignorant both of the condition of the step and of the condition of the yard, he was guilty of the grossest sort of contributory negligence in attempting to step upon the foot-plate attached to the pilot under the conditions at that time existing.

Tennessee's knowledge of the condition of the yard.

To begin with, we have it from the plaintiff himself that he was not a novice in the railroad business. He starts out by stating in the beginning of his examination that he had

been railroading for twelve or fifteen years in the capacity of brakeman and switchman, and that he had worked for seventeen or eighteen different roads during that time, but before he concludes his evidence in rebuttal of defendant's evidence, he finds it necessary to remember that he had had a much larger experience than this, and that he had also been employed in the construction of yards, and that he was well informed and competent to speak as to how yards should be laid out and constructed. He states that he commenced to work for the defendant about the 1st of December, continued to work until laid off in January, and did not go back to work any more until the 5th day of February. That he ran a part of the time from Brinkley to Memphis, and when they ran the first schedule in from Memphis, he came through on the first train about the 12th or 14th of December, and up until the time they commenced to use the new yards they came down the old main line, because the new yards had not then been fixed (Tr., p. 25). That the lead track to which the tracks in the new yard were connected, ran out from the main line in Argenta, and that there were seven or eight tracks in between the lead and the main track. That after he commenced to run into Little Rock, he made a trip pretty near every day until the time he laid off in January. That during that time he was running on a freight. That they generally got here about 9:30 or 10 o'clock in the morning, and sometimes got in on time at 6:10, which was daylight. That they generally got out about 6:40 the next morning, which was daylight (Tr., p. 25). That up until the time they commenced to

use the new yards, they made up their trains on the scale track, which is below the new yards, and that in going down to the old yards they had to pass below the new yards, and in coming back again they had to go along the old line out through the new yards. That the new yards are in sight from the main line track. That during that time he was head brakeman and that his position was on top of the train. That if he had looked from the top of the train he could have seen into the new yards (Tr., p. 32). During this time he lived at 410 Maple street in Argenta. That a short time before Christmas, he came down the old main line and the yardmaster told him to head into the new yards, that they were ready for use; so he backed down and headed down into the new yard. He then testified as follows:

Q. The first trip that you came back in the daytime, what track did you come in on?

A. We headed down the old main track until near about Christmas. About a day or two before Christmas, I came down the old main line and the yardmaster told me to head into the new yards, that they were ready for use; so I backed out and headed down the new yard.

Q. Could you see, when you headed in on that track, that those ties were not filled in?

A. Yes, sir, I saw some of them were not filled in.

Q. Were any of the ties on that new track filled in?

A. Not as I know of.

Q. All that you know of were not filled in?

A. Yes, sir (Tr., p. 33).

He testified (Tr., p. 39):

Q. You stated that the first time you went into the new yards, you started down the old track and they told you to head into the new yard?

A. No, sir, not the first time. The first time I went into the new yards I went down the old main line.

Q. Who told you to go into the new yards the first time you went in there?

A. Mr. Wilson, the yardmaster.

Q. He told you this yard was ready for use?

A. Yes, sir.

Q. When was that?

A. That was about the 18th or 19th of December, or about the 20th or 21st, only a few days to Christmas.

Q. You went in on the new track, what side track did you go in on?

A. I think it was No. 1 track.

Q. You made how many trips after that into the new yards before you were hurt?

A. About three.

Q. What tracks were you on before?

A. The first time we headed in on No. 2, and the next time all the tracks were filled up with cars and we went around on the lead.

Q. Where did that throw you?

A. That throwed us on the outside of the yard on the last track in the yard.

Q. What track were you hurt on?

A. No. 3.

Q. You never had been on that track before?

A. No, sir, I never had headed in on No. 3 track.

On transcript (p. 30) he testifies as follows:

Q. Did you know the condition of the ties, whether they were filled in or not at that time?

A. No, sir, I didn't ever pay any particular attention to them. I never had been in there more than once or twice and I don't think I had ever picked up a train off of that track. Generally our train would be on one, two or three, and sometimes on the lead.

Q. You don't recollect ever having been on that track at all?

A. No, sir, not that I know of.

He testified as follows (Tr., p. 34):

Q. You say at the time of the accident you left the yards about 8 o'clock that morning?

A. Yes, sir, we left about 8 o'clock.

Q. You got back about 10 o'clock that night?

A. No, sir, the next night, Tuesday night.

Q. Did you have your lantern in your hand when you came down to throw those switches?

A. Yes, sir.

Q. How did you go along?

A. I walked on the outside of the track to the first switch.

Q. Why were you walking on the outside?

A. I was trying to find a clear track, I had to walk out there to see if the track was clear, so I could see around the curves.

Q. Did you look to see if these ties were filled in or not?

A. No, sir.

Q. You had your lantern?

A. Yes, sir.

Q. You could have seen?

A. Yes, sir, if I had taken time I suppose I could.

Q. What kind of a headlight did that engine have?

A. It had an electric headlight.

Q. Are not these electric headlights very brilliant?

A. Yes, sir, but you can't see around the curve.

Q. That wasn't on a curve, was it?

A. Yes, sir.

Q. Didn't that electric headlight light up the lead track down in front of you?

A. Yes, sir.

Q. The train was on the lead track, wasn't it?

A. Yes, sir.

Q. And you said you got injured on the lead track?

A. No, sir, I got hurt on No. 3.

Q. Do you mean to say that you had lined up No. 3 and the train was going in on No. 3?

A. Yes, sir.

Q. So you had already passed that track the train was going to head in on and had lined up the switch?

A. Had lined the switch up for that track.

Q. No. 3 leads out from the lead track, doesn't it?

A. Yes, sir.

Q. This headlight lit up everything in front of you?

A. Yes, sir.

Q. If you had looked you could have seen whether the crossties were filled in or not, couldn't you?

A. I suppose I could if I had stopped to look.

Q. I will ask you if this electric headlight doesn't light things up very brilliantly?

A. Yes, sir.

Q. You could see objects three or four hundred yards in front, couldn't you?

A. Yes, sir, about that far.

Q. It is so light?

A. It is very light.

Q. And if an engine with an electric headlight is moving down there and you are down there you can observe as well then the condition of the track as you can in the daytime, can't you?

A. A man's mind is not on the track.

Q. I am not asking you that?

A. Yes, sir, if he was to stop and look he could.

Q. You say you had thrown this third switch?

A. Yes, sir.

Q. When you gave the signal for the engineer to come ahead, what position did you take in order to step on this engine?

A. When I gave him the signal I stepped over into the track to catch the pilot.

Q. Into the middle of the track?

A. No, sir, not in the middle of the track, on the inside of the rails.

Q. You had your lantern?

A. Yes, sir.

Q. Did you observe whether the track was filled in or not?

A. I wasn't looking at the track, I was looking at the pilot of the engine.

Q. Did you look to see where you were stepping?

A. Yes, I had my light in my hand to look up at the pilot of the engine when it come to me.

Q. If you had looked down you could have seen that the ties were not filled in, couldn't you?

A. Yes, if I had looked down to my feet I could.

Q. You were standing there on the track with your lantern in your hand and the electric headlight shining?

A. Yes, sir, but I pulled my hat down over my eyes.

Q. What did you pull down your hat for?

A. So the headlight wouldn't blind me.

Q. You were standing there on one of the ties?

A. Yes, sir.

Q. And the electric headlight blinded you so you pulled your hat down over your eyes?

A. Yes, sir, to keep it from blinding me.

Q. You were standing looking down waiting for the engine to come up to you?

A. No, sir, I wasn't looking down. I had my eyes kinder slanting up.

Q. You pulled your hat down so it would be down just far enough to keep the light out of your eyes?

A. Yes, sir.

Q. That brought your line of vision somewhere near the top of the pilot?

A. Yes, sir.

Q. And you waited there?

A. Yes, sir (Tr., pp. 34, 35, 36).

Witness **WESLEY GRAVES** (Tr., p. 45) testified that these were new yards; that he was working for the road at the same time Tom Tennessee was; that he came in twice a week and had to go out twice a week; that Tennessee was performing a similar service on other trains; that Tennessee would be going out as he came in, and sometimes they would both go out on the same day; that he knew pretty well how these yards were constructed; that it was perfectly apparent that these ties were not filled in, and that he knew the condition of them; that the road was doing considerable work, putting in new yards, making an entire change, in fact, making almost a new line, enlarging their terminal facilities, making extensive repairs, working on many of their bridges, raising and widening the dumps. That they were working in almost every department of the road; that going around the lead track a pretty good view of the new yards could be had; that going out of the yards you can see the condition of them (Tr., pp. 45, 46).

THOMAS CUNEO testifies that the condition of these yards was perfectly patent and apparent to the eyes; that

anybody could see if he ran in there; that he made two trips with Tennessee into the new yards (Tr., p. 53).

JOE MEYERS testified (Tr., p. 71) that the condition of the track was apparent.

HILLIARD GRAVES testified (Tr., p. 77) that he was swing brakeman on that train at the time of the accident. That this was the second trip that Tennessee had made with him; that in December they came into the new yards; they were then putting in new tracks.

F. C. WEAVER (Tr., p. 86) testified, that in January or February he was running a freight train from Little Rock to Memphis; that Tennessee made one trip with him. They left from North Little Rock over the new yards. That when they came in they came into the new yards; that Tennessee was head brakeman; that he left at 6:55 a. m., and arrived back at 12:05 in the afternoon; that the condition of the tracks was apparent to anyone going in there on a train.

Tennessee testified on cross-examination (Tr., p. 97) that the information which he obtained with reference to the condition of the track at the place of injury was obtained the night that he was injured by the light of his lantern while he was sitting there waiting for them to come for him and take him to the hospital. That the electric headlight of the engine made a much more brilliant light than his lantern did. The blue print attached to the transcript shows the situation of the new yards with reference to the main track.

Was Tennessee in the proper place in the discharge of his duty at the time of the accident?

Tennessee testified, in his re-direct examination (Tr., p. 39) and that it was his duty to get on that step to make couplings, and also to get on there to ride into the switch yard; that it was the head brakeman's place to ride in front of the engine. He was then asked this question:

Q. *Had anybody ever told you to do that?*

A. *No, sir.*

He then said it was the custom on this and other roads and that in attempting to step on this step he was in the discharge of his duty. In this connection we desire to call the court's attention to the leading character of the questions and that it is his counsel testifying rather than himself.

In his cross-examination (Tr., p. 38) he says that if the track would have held his train in the clear, he would not have been on the front end.

In his cross-examination (Tr., p. 34) he states that he had gotten down and walked ahead of the engine to find a clear track on which to put the train. The record shows that this track has a capacity of forty-one cars, and that it was amply sufficient to hold Tennessee's train, and that the train was in fact left on that track that night.

Engineer Cuneo (Tr., p. 51) testifies that the only purpose for which that step is used is for the head brakeman to stand on while making what are known as pilot-bar couplings, that is, when the engine is to be coupled to a car to be pushed ahead of the engine, and that it was put there for no other purpose, and that Tennessee had no duty to

perform there at that time. As we have seen, Tennessee testifies that he found a clear track, and Cuneo also testifies that there were not any cars on that track at all. He testifies that after lining up the third switch Tennessee should have gotten on the step at the back of the tank, or on the ladder of the first box car, as that was his place; that as soon as the train is in the clear it is the head brakeman's duty to cut the engine off from the train and carry it into the roundhouse; that he was supposed to get on behind the engine. That there were ladders on the box cars, and on the back end of the tenders there is a big step, about eight inches wide and about eight feet long made of heavy board, which always have handholds.

WESLEY GRAVES testified (Tr., p. 42) as follows: That the proper position of head brakeman going in the yards at North Little Rock was to ride on the front end of the engine to line up the switches, to keep the engine from derailing by going out of an open switch and to see that the track is clear; that he is supposed to have a place to ride; that he was in the habit of doing it and did it till this day; that there had not been any objections to head brakemen riding on this particular place from the officers of the company, and that he did not know of any rule to prevent a man from riding there when they instructed him to ride there.

The cross-examination of Wesley Graves beginning on transcript, page 43, shows that witness was utterly at sea as to what he was talking about. He first professed to know the rules, and then he said he did not know them; he first said they were not working under the standard rules, and

then finally admitted that they were, and then when questioned as to what the rule was in respect to riding on the front end of engines, said he did not remember just exactly what the rule was. He was then handed a book of the rules and requested to read Rule No. 202, which he did as follows:

"Employees are warned not to catch on to the front or rear end of the engine as it approaches them, to jump on or off trains or engines moving at a high rate of speed, to get between cars in motion to uncouple them, or to follow other dangerous practices."

JOE MEYERS (Tr., p. 70) testified that it was the duty of Tennessee to head the engine in and take the train into the clear; that his duty was to cut the engine off and take it to the roundhouse; that on this occasion he was just heading into the switch and had gone in about ten feet from the points and that it was his duty to catch the first car behind the engine or the rear of the engine, so as to cut the engine off; that if he had been in the proper discharge of his duty he would have taken his position at the back end of the engine; that they had something in the neighborhood of twenty cars that night; that there were no cars standing on the track they were heading in on, and that there was plenty of room for the train to clear; that the headlight shone down there, so that this fact was perfectly apparent; that this step is put there to couple and uncouple the engine; that it was not put there for any other purpose; that there was no rule of the railroad at that time which directed head brakemen to step up on this little step, but there was a rule which prohibited it.

R. W. HARRIS testified (Tr., p. 74) that after Tennessee had thrown that third switch that his duty was to be on top of the car where he could see the engineer, so that when they got the train in the clear, he could cut the engine off and take it to the roundhouse; that they left the train on that track; that there were no cars in front of them. That there is no rule of the company which requires a head brakeman to stand in front of an engine and attempt to step on that step as the engine approaches them; that in case of doubt, to take the safe side; that if the brakeman has any duties to perform on that step, he has a right under the rules of the company to stop the engine; that he knows of that being done on the road; that if there had been any other switch to throw he could have gotten on the gangway or could have stopped them and got on the front step; that it is not customary for head brakemen to ride in front to throw the switches before taking the engine into the yards; that he had a book of the rules of the company at that time; that he knew the custom of brakemen because he could see them; that he was studying then to be promoted to the position of brakeman, and he had to help switch and also inform himself as to the rules of the company.

HILLIARD GRAVES testified (Tr., p. 78) that he never made a practice of getting on the pilot; that it looks dangerous to him and he always avoids it; that it is not regarded as dangerous by all, and that it is a very customary thing for brakemen heading into the yards to jump on that pilot step and ride.

MR. S. H. BARNES, trainmaster, testified (Tr., p. 80) that ordinarily the duties of a head brakeman are to turn the switches leading into the yard, and find a clear track for his train. The track leading from the main track to the yards is called the lead track. In these yards there are various tracks where trains may enter and stand until they can be provided for. The head brakeman should open the main line switch and find a clear track leading from the lead and see that there is nothing in front of the train and direct the engineer to run in until all of his train is in; that in the performance of this duty it is not necessary at any time for the head brakeman to stand in the middle of the track and attempt to put his foot on the little step in front of the cowcatcher when the engine is moving towards him. If it is necessary for the head brakeman to couple to some cars, he should signal his engineer to come ahead until he gets near to the car he expects to couple to, stop him, and then get on the step and make the coupling. We instruct them not to get in front of the engine while it is moving; that when the train comes into the yards and the brakeman finds a clear track and lines up the switch so that the engineer can head in on the switch, he should get on top of some car near the head end of his train where he could see a signal from the rear of the train and transmit that signal to the engineer, so that the engineer may know when the train is in the clear; then he should stop when the train is in the clear and the head brakeman should cut the engine off and permit it to go to the roundhouse. Sometimes the head brakeman is required to take the engine to the roundhouse and sometimes the yard-

master; that there was a rule in force at the time of this accident which prohibited brakemen from standing in front of an engine and attempting to step up on the pilot as the engine was moving towards them; that it is considered a dangerous practice with a road engine for brakemen to stand in front of the engine and attempt to step on this step. By road engine, he said he meant a freight engine, an engine that has a pilot; a switch or yard engine has no pilot or cowcatcher, as it is sometimes termed, but has a step perhaps six inches above the rail fastened to the front end of the engine. This front step hangs from what is known as the pilot beam and above this pilot beam is a hand-hold, so that the switchman riding back and forth can stand on this step on each end of the engine holding on the hand rail, and while the railroad company does not permit them to get even on the yard engine while it is in motion, that is the rule, as a matter of fact the switchmen do it more than the road men with the road engines. The road engine has a pilot or cowcatcher and no hand-hold to catch hold on, and sometimes hasn't a step of any description. Ordinarily it has a small step on the bottom of the pilot three or four inches wide. It is there for use when it is necessary to make what is known as the pilot-bar coupling, and when the engine is supplied with an old-style pilot bar, the brakeman, if he does as he should, will stop his engine within two or three feet from the car, then step on the step, pick up the bar, hold it up, and when it enters the coupling of the car signal his engineer. That is what that step is for. That is the only use that the brakeman is expected to make

of that step. If he does not have to make a coupling he should get on the side of the engine. Steps are provided for that purpose on the side near the cab. After a man has thrown the last switch going into the yard, he has no duty to perform which requires him to get in front. If there is any car in front which it is necessary to make a coupling to, he should then only get on the front end of the pilot after he has made the stop close to the car in order to enable him to pick up the bar.

We invite the court's most careful attention to the evidence of Mr. Barnes, as it is the clearest explanation contained in the record of the duties of a head brakeman and the purpose for which this step is intended.

F. C. WEAVER testified (Tr., p. 86) that he had been a freight conductor on the Choctaw road, and that Tom Tennessee had made one trip with him as head brakeman. He stated that it was the head brakeman's duty to throw the switches in front of the engine and head into the yards. Next after that, he gets on top of the train, that is the proper position until the rear of the train has pulled into the yard.

I. M. WIGHTMAN, general yardmaster, testified (Tr., p. 88) that when the train was coming into the yards it was the duty of the head brakeman to turn the switches in front of the engine; that after he has turned the last switch and the train is headed in, he is supposed to get on top of the car behind the engine, where he can see from the rear end, so that he can signal the engineer when the train is in the clear. That if there is a pilot bar coupling to make, he should get on the step ten or fifteen feet from the car. That even if there had been

other switches to throw he shouldn't have got on to ride thirty-seven car lengths. That if he did not know whether his train would clear, he should wait until he got the proper signal from the rear.

Tennessee, in his evidence in rebuttal (Tr., p. 93), gives as his reason for getting on the step the following: "Why I did not know how long the track was, and didn't know whether it would hold the train or not. Didn't know the length of the track, and didn't know the capacity of it at all, and there was a cut-off switch at this end of the yard that runs across the yard out off of the main line, and in case this track didn't hold the train I had to be able to line up these switches."

He admitted (Tr., p. 38) that he would have had no duty to perform in front of the engine except upon the contingency that the track was not long enough to hold the train; he also stated (Tr., p. 94) that an engine running at the rate of three or four miles an hour is not any more dangerous to get on the step of the pilot than it is to get on standing still. It is a customary thing with all brakemen to get on those steps running at that rate. It is not any more dangerous than to get on an engine standing still.

In this connection, we wish to call the court's attention to some confusion which has arisen in the testimony of Tennessee and Wesley Graves with reference to riding on that step and standing in front of an engine and getting on it when it is moving towards them. It is very much more dangerous to attempt to stand in front of a moving engine and mount the step than it is to ride on the step after one has obtained a foothold.

We think this evidence clearly establishes that Tennessee had no duty to perform on the step at the time of his injury. Simply because he said he did, does not make it so. It devolves upon him to establish that fact by giving some satisfactory and substantial reason why he should be there. He admits that he had gone ahead of the engine and found a clear track. Now, the only reason which he assigns for his presence there was that he did not know whether track No. 3 would hold his train, and admits that if he had known that it would, he would not have undertaken to have mounted this step. It turns out then that the very reason that he gave for his presence there is in this case no reason at all, for the uncontradicted evidence shows that there were only about twenty cars in his train and that the track had a capacity of forty-one cars. But, he says, that he did not know how many cars there were in his train and did not know the capacity of the track. Then, we ask, How was he to know whether he had any duty to perform upon that step? If he did not know positively that he did not have other duties to perform upon this step, then he should have informed himself or taken his position at some place where he could have been advised of that fact as the train was pulled into the switch. Now, if he had taken his position at the gangway of the engine, or on the top of the first box car in the rear of the engine, where he could have received signals from the rear, he could have then known at the proper time whether he had other duties to perform in the way of lining up switches ahead of the engine, but he took his position in front of the engine where he shut himself off from a signal either from the train crew or from

the engineer, and at a place where it would be impossible for him to tell whether there would be any other duties for him to perform.

Again, Mr. Wightman says that even if he had had other switches to throw at the lower end of that track, he should not have undertaken to ride on the engine that distance. Mr. Cuneo, Mr. Harris, Mr. Weaver, Mr. Barnes, and Mr. Wightman all state positively that it was his duty to get on the step on the side of the cab of the engine, or to get on the step in the rear of the engine, or to get on the box car just behind the engine where he might receive signals from the rear end of the train and transmit them to the engineer when the train was in the clear, and then after that was done to cut the engine off from the train so that it might be carried into the roundhouse.

Tennessee has not established any necessity for having attempted to mount that step on this occasion. The facts in this case do not bear him out in the reason that he gives for it, but on the other hand, show that it was entirely unnecessary and improper for him to take this position at this time. But let us, for the sake of argument, give Tennessee the benefit of the doubt, and admit that it was his business and duty to ride upon the front end of the engine on that occasion then certainly he would be required to perform that duty in a way not in violation of the rules of the company and to exercise ordinary care to protect himself. No one can deny that it is more or less dangerous to ride upon so small a step attached to the pilot of an engine. But this is not the question involved here. The question here is the question of

how to get upon that step. Now, it is in evidence that the railroad company had promulgated a rule prohibiting this very thing. Tennessee claims, however, that this rule had never been brought to his attention. It is shown by the evidence, however, that the railroad had in force at that time what are known as the standard rules, and he admits that he knew roads generally had rules, as he had worked for seventeen or eighteen different roads, and he certainly must have known what the standard rules were, and he certainly must have known that this road had some rules. A man with as much experience in the railroad business as he claims to have had must know that no railroad can operate without a system of rules.

WESLEY GRAVES (Tr., p. 44), who was an employee at the same time that Tennessee was, admits that they were working under the standard rules. Engineer Thomas Cuneo seems to have been familiar with the rules. Fireman Joe Meyers testified (Tr., p. 71) that in December or January, the master mechanic, Robkin, gave him a book of the rules, and R. W. Harris, flagman, testified that he had a book of the rules (Tr., p. 75). In fact, the rules seem to have been generally distributed and the employees were more or less familiar with them, and it is a curious thing that Tennessee should be the only one without the rules. But regardless of whether Tennessee had knowledge of any rule on this subject, let us examine the record for a moment, ascertain the circumstances under which Tennessee attempted to mount this step, and the opinions of the witnesses testifying as to whether this was a safe or prudent thing to do. The record shows that the step is

bolted onto the bottom of the pilot, sometimes called the cow-catcher, about six or eight inches from the point of the pilot; that it is wide enough for a man's foot to slip in, and there is a groove on the outside to keep a man's foot from slipping. It is bolted under the pilot. It is made of sheet iron (Tr., p. 24). Tennessee testifies that they arrived in the yards about 10 o'clock that night, and then proceeds to tell how the accident happened (Tr., p. 27). The record also shows that this step "sets angling with the pilot" (Tr., p. 38). The record also shows that it had been raining all that day (Tr., p. 36). That it was raining at the time of the accident, and that the pilot was slick (Tr., p. 50). Tennessee threw the switch, gave the engineer the signal to come ahead, stepped over into the track on the inside of the rails with his lantern in his hand, pulled his hat down over his eyes, so as to protect him from the electric headlight, and so that his line of vision was brought about to the top of the pilot of the engine (Tr., p. 35). There he stood so that he could not observe any part of the engine except the pilot, and when it came near enough he undertook to place his foot upon this small slanting step while the engine was approaching at the rate of about four miles an hour. His foot slipped and he fell, and the result was the loss of his leg (Tr., p. 35). He testified that in other yards where the ties were leveled, that he had slipped off lots of times and caught himself. In his cross-examination, he testified that he had slipped off wet days and dry days, and furthermore, that he had seen some of these steps break off (Tr., p. 31).

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THOMAS CUNEO (Tr., p. 54) testified that it was a dangerous thing to undertake to step on that little iron step when the train was in motion; that on that night it was very dangerous, as it was wet and slippery.

R. W. HARRIS (Tr., p. 74) testified that it was regarded as dangerous by railroad men for a man to attempt to step on one of these little steps when the train is in motion, and that if it is desired to get upon this step the signals ought to be used and the engine stopped; that it is dangerous at any time, but on account of the fact that it was slippery that night it would be more dangerous.

HILLIARD GRAVES testified (Tr., p. 78) on cross-examination, as follows:

"Q. Had you been warned by your brother (referring to witness Wesley Graves) not to get on that step?

A. Yes, sir; he told me about catching on the step in front of an engine that way.

Q. Did he tell you that the step was in a bad condition?

A. Why, he told me that none of those steps were safe to get on; No. 5 and other small engines.

Q. Did he caution you about that particular engine, No. 5?

A. That was the first day we came out on No. 5.

Q. Didn't he warn you not to step on No. 5?

A. I was warned to be cautious about getting on all of those pilots.

Q. Didn't you say awhile ago that you were warned especially about No. 5?

A. Yes, sir; he warned me about all of those small engines, and more particularly about these larger engines. That No. 5 was a new engine, that was the first time I ever seen that engine or handled it, to be on a train with it.

Q. You are an extraordinary careful brakeman?

A. Yes, sir; I am careful.

Q. It is a very customary thing for brakemen heading into yards to jump on that pilot step and ride, isn't it?

A. Yes, sir.

Q. If an engine was moving at a slow rate of speed, it is not very dangerous, is it?

A. No, sir.

Q. It is not dangerous?

A. No, sir; unless a person's scared of it; it's like playing with fire; it is liable to hurt you."

MR. BARNES testified that it was a dangerous thing to step on these road engines, and that a rule had been made prohibiting it.

THOMAS TENNESSEE, in his evidence in rebuttal on page 94 testified that it was not any more dangerous to get on the step of the pilot of an engine moving at a slow rate of speed like this one was than when the engine was standing still. This piece of evidence is characteristic of Tom's whole evidence, as it shows that his zeal in his behalf was leading him to make very extravagant and absurd statements. He did not stop to think what a ridiculous statement this was, because he must know that it is absolutely impossible for an engine standing still to run over a man and cut off his leg. Tom showed that he was quite handy as a witness on any question. If it was to his advantage not to know what the rules of the company were, he did not know them; if it was to his advantage to be able to testify as to how a yard was constructed, he was amply equal to the emergency. The record also shows (Tr., p. 38) that Tom practically had only one hand, and this was his left hand. On his right hand all of the fingers were off except the little finger and the one next to it. He also testified that there were no hand-holds on the engine and that when he placed his foot on this little step it was necessary for him to lean forward in order to put his hand on the top of the pilot to balance himself.

With all of these dangerous conditions existing it is inconceivable how anyone can reach the conclusion that it was anything else but a very dangerous act to attempt to mount this step under these conditions, and in addition to these facts, and from this standpoint, the contention that Tennessee makes that he did not know the condition of this yard is against him, and shows the utter recklessness that characterized his actions on this occasion. He testified that he had slipped off of steps like these both dry days and wet days; that he knew steps of this kind broke off sometimes. With this experience in the past, can it be said that he was using ordinary care to protect himself from harm without looking to see what his surroundings were, and ascertain if there were any impediments in the way of getting off the track in case he slipped or the step broke? If he did not, it only adds to his negligence, and renders it the more inexcusable that he should have attempted it on this occasion, when the hazards in other respects were largely increased. His action is rendered more inexcusable for the further reason that he was absolutely in command of the situation, and if he had an idea that he had other duties to perform in the yards ahead and conceived it to be his duty to ride upon the front end of this engine, upon this step, it was entirely within his power to have signaled the engineer to stop until he could safely take his position on this step before the engine proceeded. Engineer Cuneo testifies (Tr., p. 52) that if Tennessee had signaled him he would have stopped for him to get on.

In the face of this evidence, if any evidence is required upon such a patent proposition, it is conclusively shown that

this was a most dangerous thing for Tennessee to attempt, especially at this time. He undertakes in a measure to relieve himself of the charge of contributory negligence by undertaking to show that it was a general custom or practice of railroad employees to thus attempt to mount the engines and ride upon them going into the yards. In this he has signally failed. He testifies himself that nobody in authority connected with the road had ever told him to do it. Harris testifies that it was not the custom of the brakemen at that time to do it. He knew this because he was making a special study of the rules in force and the practices then prevailing among employees of the railroad company, expecting to be promoted to the position of brakeman, and was thus learning something of the duties that would devolve upon him in that position. Hilliard Graves testifies that he never made a practice of doing it, because it was dangerous. Conductor Weaver testifies that Tennessee had no business in making this attempt, and if he had any duties to perform in front of the engine, or thought he had any duties to perform there, he should have walked in front of the engine, and so does Yardmaster Wightman. Wightman was the yardmaster, and if any such practice had been prevailing in the yards it would have been an easy matter to have established the same by him. But the proof also shows that the defendant company had only been operating the road for about two months and it would have been impossible in that time for any practice to have sprung up in that respect that would have amounted to an abrogation of the rules prohibiting such practices. Furthermore, we do not understand that employees of a railroad

company can engage in a practice which is in itself dangerous, thereby abrogating a positive rule of the company on that subject, and then charge the company with negligence for a failure to enforce the rule, for they themselves would then be permitted to take advantage of their own wrong. If it could be said that this practice prevailed at this time, then Tennessee was as much responsible for it as anyone else, and if he had helped to establish the practice, then he must assume the risks of any dangerous custom or practice which he assists in establishing.

If it can be said that Tennessee had a duty to perform at this time, then he must give the railroad the benefit of the fact that it had also established an easy and a safe way for him to perform that duty. If it had been necessary for him to turn other switches at the lower end of the yard, the only difference that it could possibly have made to him if he had taken his position at a safe place on the engine, or on the first car behind the engine, would have been the physical exertion it would have cost him to walk the length of the engine.

We believe that this covers about what the record discloses in this case as to the facts, and we have attempted under each particular head to collate all of the evidence in tangible shape. Briefly summarizing then, our position from the evidence is this: first, the record does not show that there was any defect in the step which contributed to the injury; second, if it does show any defect which contributed to the injury, it does not show that the defect was caused by reason of the failure of the company to exercise ordinary care in reference thereto; third, if it does show a defect and that the railroad

company is chargeable with negligence in reference thereto, that it cannot be made the basis of a recovery in this action for the reason that it was not the proximate cause of the injury, for the plaintiff alleges in his complaint that if it had not been for the condition of the ties, he would have been able to extricate himself and prevented the injury, and testified positively to this fact in his evidence (Tr., p. 31), which evidence we believe we have not heretofore adverted to; fourth, the record does not show that the railroad company was in any manner negligent in the construction of its yards, which plaintiff alleges caused the injury; fifth, if it does show that the railroad company was negligent in the construction of the yards, the record also shows that the plaintiff was fully advised of and knew the condition of the yards prior thereto and at the time of the injury; sixth, that if the record does show that the railroad company was negligent in reference to the step, and was also negligent in reference to the construction of the yards, and that the plaintiff had no knowledge of the condition of the step or yards at the time of the injury, still he cannot recover for the reason that he was guilty of the grossest sort of contributory negligence in attempting to mount the step at the time of the injury, in plain violation of the positive rules of the company, and at a time when he had no duty to perform at that place.

It occurs to us that a mere rehearsal of the evidence is quite sufficient to show that the lower court undoubtedly erred in refusing to instruct the jury to return a verdict for the defendant, and also that the verdict of the jury was clearly contrary to the evidence and the instructions of the

court. In support of the positions here taken we beg leave to submit the following

AUTHORITIES.

Alleged negligence as to the condition of the step.

Tennessee had made the trip on this engine from Little Rock to Hopefield, opposite Memphis, without any accident so far as this step was concerned. Cuneo, the engineer, testified that it was his business to inspect the engine before the return trip was begun, and that he did make the inspection and found the step to be in good condition. The return trip was almost completed and the proof shows that the step had been used frequently on the return trip without any accident. As to these facts, there is no conflict in the testimony.

Now, the authority is clear that the fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer had been guilty of negligence.

> Texas and Pacific Railway Co. *v.* Barrett, 166 U. S., 617.
> Patton *v.* Texas and Pacific Railway Co., 21st Sup. Ct. Rep., 275.

In the case of the Texas and Pacific Railway Co. *v.* Patton, 61 Fed., 259, and also 95 Fed., 244, the syllabus reads:

"While a locomotive fireman was descending from a moving engine in a careful manner, the step turned, owing to its being loose, and he was thrown to the ground and injured. The locomotive had just come in from a run,

during which the step had been safely used several times. The roundhouse foreman at a certain point testified that he removed the step at that place, but he replaced it, or caused it to be replaced, properly, and that he was sure that the nut fastening the step was screwed up tight.

"*Held.* Insufficient to warrant a verdict against defendant railroad company for negligence."

Patton v. Texas and Pacific Railway Co., 21st Sup. Ct. Rep., 275.

In this particular case the failure of the railroad company to discharge the duty which it owed to the plaintiff with reference to the step cannot form the basis of a recovery, for the reason that it is shown that the only purpose for which the step was placed upon the pilot or cowcatcher of the engine was to enable brakemen to make what are known as pilot-bar couplings, and if a brakeman used the step for the purposes, and in the manner that it was intended that it should be used, it would be impossible for a defect in it to result in any serious injury to one of the railroad's employees. The only duty which the railroad company owed Tennessee with reference to this step was to see that it was safe for the purposes for which it was designed, and if in the use of the said step for the purpose for which it was designed it would have been impossible for the injuries to have occurred, the plaintiff cannot recover. Or, in other words, if the plaintiff was using said step for any other purpose than that for which it was designed, and was injured, he cannot recover, regardless of whether said step was safe or not, or whether the defendant knew or ought to have known of the defect or not.

Little Rock and Fort Smith Railroad Co. v. Townsend, Ad., 41 Ark., 382.

The alleged negligence in the construction of the yards.

On this proposition we wish to say that it seems very questionable as to whether this is a matter that can be left to the discretion of the jury. It is almost entirely a question of the most practical method of constructing this yard, and Mr. McAvoy, who had charge of the matter, stated that considering the physical conditions existing that this yard was properly constructed. We do not see how the evidence of Tennessee, who tried to contradict McAvoy upon this proposition, can really be considered as worth anything. In fact, the court practically told the jury to disregard the evidence of Tennessee upon this question. Mr. McAvoy explained that in a yard like this it had to be gone over for six or seven months, or probably a year, before it thoroughly settled; that unless this was done before it was finally filled in the track would go down in the mud. Now, it is unquestionably true that the railroad company cannot be held liable, both for filling in between the ties and for not filling in between the ties. Suppose that Mr. McAvoy had filled in between the ties when the yard was first built; according to his ideas, it would have been impossible in that way to have made a good foundation for the track to rest upon, because, he states, it would have gone down in the mud. We all know, as a matter of common observation, that all earth is not alike; we all know that it is more difficult to get a good foundation for a roadbed in some places than it is in others. McAvoy stated further that the only way that they could get the earth settled so as to make a proper

foundation was to use these tracks, and it was customary to use tracks in this condition on other roads. Now, then, let us suppose that Mr. McAvoy had filled in these yards and thereby rendered it impossible to make a proper foundation for this track No. 3, and in using it the ties had gone down in the mud and produced a low joint; and suppose that Tennessee had come into the yard riding on this step and the engine had struck this low joint and thrown him off in front of the engine and run over him, how would the case stand then? Why, unquestionably the railroad would have been liable, for the reason that, according to McAvoy's statements, the road would not in that case have been properly constructed. We say that this is a question of the most practical and safest way to construct this yard, which must be left to the discretion of the officials in charge of the railroad. We must remember that this was not an old yard getting out of repair by reason of long use, but that it was a new yard just under construction, and Tennessee knew that fact, because he had been running in and out of it, and this is one of the very conditions out of which the doctrine of assumed risks arises, and for injuries growing out of which the servant has no right of action against his master.

In the case of Tuttle *v.* Milwaukee Ry., 122 U. S., 194, the court say:

"We do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it shall be left to the varying and uncertain opinions of juries to determine such an engineering question.

(For analagous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see Richards *v.* Rough, 53 Mich., 212; Hayden *v.* Smithville Manufacturing Co., 29 Conn., 548, 558.) The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employees. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and if they decide to do so, they must be content to assume the risks. For the view of this court in a cognate matter see Randall *v.* Baltimore and Ohio R. R., 109 U. S., 478, 482, where it was said: 'A railroad yard where trains are made up, necessarily has a great number of tracks and switches close to one another, and anyone who enters the service of a railroad corporation connected with the moving of trains, assumes the risks of that condition of things.' It is for those who enter into such employment to exercise all that care and caution which the perils of the business in each case demand. The perils of the present case, arising from the sharpness of the curves, were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employees have reason to suppose is in proper working condition. *Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed.*" See also

Twitchell *v.* Grand Trunk Railway Co., 39 Fed., 419.

Logging Co. *v.* Schneider, 74 Fed., 195.

In the case of Southern Pacific Co. *v.* Seley, 152 U. S., 151, the defendant asked the court to charge the jury as follows:

"The jury are instructed that if they find from the evidence that the railroad companies used both the blocked

and unblocked frog, and that it is questionable which is the safest or more suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant."

The court held that the instruction should have been given.

Now, we ask, how can that case be distinguished in principle from the case at bar? Mr. McAvoy is shown to have been in the service of this company and its predecessors on this same line for twenty-four years, and therefore it may be fairly presumed that he was competent to discharge the duties which devolved upon him, and that he was more thoroughly acquainted with the physical conditions existing in this case than the plaintiff. Now, if he testifies that this yard was constructed in the usual and proper manner, how can negligence be imputed to the railroad company because the yard was not constructed in accordance with the ideas of the plaintiff in this case?

In line with these facts was the case of Finell *v.* Delaware, Lackawanna and Western Railroad Co., 129 N. Y., 669, the syllabus of which is as follows:

"Railroad tracks are not ballasted for the purpose of making them safe for the employees of the company to walk thereon, but to make them firm and safe for the passage of trains; and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty to the employees."

In Morris *v.* Duluth S. S. & A. R. R. Co., 108 Fed., 747, this court said:

"Railway companies have the right to exercise reasonable judgment and discretion in the construction of their roadbeds and safety appliances."

In this connection it must also be remembered that Tennessee was not required to make up any trains (Tr., p. 33 and 87) in these yards. He was only required to leave his train on these tracks when he came in and only to get his train from these tracks when going out. Mr. Barnes testified (Tr., p. 80): "Off of this lead there are various tracks where trains may enter and stand until we can further provide for them."

Negligence cannot be imputed to the railroad on account of the construction of these yards, for the very obvious reason that it was a clear case of a risk which Tennessee assumed when he entered the employment of the company.

It must be borne in mind that this is not a case of an employee going into these yards for the first time without any previous knowledge as to the extent, character or condition of the same. The proof showed that these yards were under construction at the time Tennessee engaged his services to the railroad. He was running into the yards over the old track day after day while the yards were being constructed and in plain view of them. He lived in the same town all during that time and had been in these yards frequently before, going in and out. He had been on several of the other tracks at various times, and by his own testimony had been all the way around the lead track with which this track is connected, and it must also be borne in mind that this injury occurred just at the junction of the lead track with the third track as he testifies that he had thrown the third switch to line it up with the lead track, then took his position on the track just inside of the rails for the purpose of stepping upon this engine. He had by his own evidence

been all the way around this lead track before in the daytime and if he was then in front of his train, as he claims his duties required him to be, then he had had, in the discharge of his duty, an opportunity more than once before to observe this very spot. It could never have been obscured by cars standing on the track, as cars standing nearer than eight or ten feet to the switches will not clear. On this occasion, he testifies that he had his lantern in his hand; that the electric headlight was shining brilliantly and lighted up the whole yards in front of him for a distance of four or five hundred yards. The proof shows that he was injured on the third track not more than eight or ten feet from the place where the third track intersects the lead track, and after he had thrown the switch he got upon the track for the purpose of stepping up on the engine, so that if he had never been in these yards before and if he had never had any previous knowledge of the same, he had every facility afforded to him at that time to observe the exact condition of things just before the injury occurred. Indeed, he testifies that he was standing up on these very ties, and if he was he must have observed that the spaces were not filled in between them. That the light was amply sufficient to disclose to him the condition of things is quite evident from the fact that he testifies that he derived all of his information as to the condition of the ties after the injury from the light which his lantern afforded him. He furthermore testifies that all other parts of the yard that he knew of were not filled in, and that if he had taken the trouble to look down to his feet he could have seen that these ties were not filled in. We do not think that it is possible for Tennessee to

have stood just on the inside of the rails with his hat pulled down over his eyes so as to bring the line of his vision to about the top of the pilot without having necessarily observed the condition of the track where he was standing and between him and the engine as it approached.

In the case of L. R., M. R. & T. Ry. Co. *v.* Leverett, 48 Ark., 333, the supreme court say:

"While there was an implied contract between the appellant and the deceased that the former should furnish and provide for deceased a safe place and roadbed in and on which to perform the labors required of him, yet the failure in that regard furnishes no excuse for the conduct of the deceased, if he voluntarily and knowingly incurred the risks and dangers of performing the labors of his employment on the defective and dangerous roadbed. If he had, at and before he was injured, full knowledge of the dangerous character and defects of the roadbed, or place on and in which he was required to work, he had the right to decline to work, or require that the roadbed or place should first be made safe, but if he did not, and with this knowledge entered upon the work, he assumed the risk and should bear the consequences. L. R. & F. S. R. R. Co. *v.* Duffey, 35 Ark., 613; Fones *v.* Phillips, 39 Ark., 36; Gibson *v.* Erie Ry. Co., 63 N. Y., 452; Wood's Master and Servant, secs. 335, 372; Pierce on Railroads, p. 379. A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only *required to take notice of such defects or hazards as are obvious to the senses.*"

Further on in the opinion on page 348, the court says:

"There was no evidence, so far as we have discovered, to prove that the deceased, before he was hurt, knew or ought to have known of the condition of the track where he was fatally injured. There was evidence tending to prove that he was employed to work, and had been working, in a part of appellant's yard in Arkansas City, where the tracks and yard were in good condition. The first time we have any evidence of his working on the road where he was killed,

or his having been there, was the night and time he was killed. It was then dark, cloudy, and had been raining. He was called to fill the place of an absent employee, and while attempting to uncouple a car, at half past 4 o'clock in the morning, was run over by the cars and so injured that he died within two or three days thereafter. The evidence does not show that the defects which led to his injury were patent to ordinary observation, at the time and under the circumstances he was hurt, it being in the night and dark and cloudy, and we do not feel at liberty to indulge in the presumption that they were."

So that we say that the facts in that case were not at all analagous to the facts in the case at bar, and that the case of the defendant in error here falls clearly within the doctrine of assumed risks there laid down.

In the case of Railway Company *v.* Robbins, 57 Ark., 383, the court says:

"If the track had been in the same condition where the injury occurred as in other parts of the yard, we think that knowledge of it should be charged to the deceased; and if he were chargeable with such knowledge plaintiff could not recover, since deceased is held to have assumed the risks arising from a known dangerous condition that had continued from the time of his employment."

In the case at bar, Tennessee testified that all parts of the yard that he had noticed before this time were not filled in, and under the rule laid down in this case, even if Tennessee had had no knowledge of the condition of the yard at the place where he was injured, or means of obtaining knowledge, either previously or at the time of the injury, knowledge of the condition would have been imputed to him.

In Davis *v.* Ry., 53 Ark., 128, the court says:

"The question for the jury's consideration was not whether the railroad company was guilty of negligence in

failing to block the space between the main and guard rails; because, even if the failure to do that could, upon the evidence adduced, be found to constitute negligence, the proof shows that the deceased continued in the service after he knew, or what is the same thing *had full opportunity to know*, that the rails were unblocked."

Clark *v.* Missouri Pacific Railway Co., 48 Kan., 654, is strongly in point. The court held:

"Where the servant has equal knowledge with the master of the construction and condition of the roadbed of the railroad company, and knows all the dangers and hazards incident to his work thereon, such servant assumes all the risks and hazards of his employment."

In Atchison, Topeka & Santa Fe R. R. Co. *v.* John H. Alsdurf, Admr., 47 Ill. App., 200, the court held:

"In the absence of any agreement, a railroad company is not bound to furnish any better sidetracks than such as are in general use, and it is proper in personal injury cases where injuries are alleged to have occurred through defective side tracks, to admit evidence going to show that the tracks in question were constructed and kept in the usual and customary manner. Railroad brakemen must be held to understand the ordinary hazards attending their employment, and to voluntarily take upon themselves those hazards when they enter upon their duties. The law will imply in a given case, notice upon the part of a servant of those things which it *was his duty to observe and with which he had ample opportunity to become acquainted.*"

In Rogan *v.* Ry. Co., 97 Mich., 265, the court says:

"Obvious imperfections in methods of machinery *existing at the time of the employment* cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools and to ask others to enter his employ to aid him in such use, and in so doing he does not undertake to insure the employee."

In Wabash Railroad Co. *v.* Ray, 152 Ind., 392, the court held:

"Where a danger or a hazard of a business is alike open to the observation of all, the master and the servant under such circumstances are on an equality, and the former is not liable to the latter for an injury resulting from such danger. An employee who has knowledge, or who, by the exercise of ordinary diligence or observation can learn of the imperfection of the machinery and appliances where he works, and the hazards of the premises where he performs the duties of his employment, and continues in the service without objection or promise of repairment, will be deemed to have assumed all the risks incident to such defects and hazards."

To the same effect see Swanson *v.* City of Lafayette, 134 Ind., 625; Big Creek Stone Co. *v.* Wolf, 138 Ind., 496; Pennsylvania Co. *v.* Ebaugh, 14 A. & E. R. R. Cas. (N. S.), 704.

The opinion in the case of Seldomridge *v.* Chesapeake & Ohio Ry. Co., 14 A. & E. R. R. Cas. (N. S.), 639, presents the reciprocal duties of master and servant in respect to patent defects and cites a number of cases in support of the principle announced, and the attention of the court is especially called to that case.

In the case of Baker *v.* Barber Asphalt Co., 92 Fed. Rep., 119, the court says:

"The very groundwork of the plaintiff's cause of action was the negligence of the defendant, as master, in failing to furnish the deceased a reasonably safe place in which to perform the work in which he was engaged. This obligation on part of the master is not, however, so absolute and unconditional that he is made responsible for any injury occasioned to an employee by imperfect construction or arrangement of the place in which the employee is assigned to work. As the master is ordinarily permitted to conduct his business in his own way and to apply such appliances

and structures as he may deem essential for his use, he is only liable to his servant for an injury when it results by reason of the neglect of the master to furnish the servant reasonably safe appliances with which to work and a reasonably safe place in which to perform it, where the servant himself is not aware at the time of the injury of the imperfection of the structure or the danger incident to the place. There is no rule of law better settled than that where the structure or place which caused the injury is perfectly obvious to the eye, and well known to the servant, both before and at the time of the accident, he himself assumes the risk of working under such conditions, and the master is excused from any liability therefor to the servant."

We think the facts in the above case are strongly analogous to the facts in the case at bar, and that it is conclusive as to this case.

In Kohn *v.* McNulta, 147 U. S., 238, the case was that of a brakeman who was injured while coupling cars. He alleged negligence in permitting cars of another road to be brought in on defendant's road, which cars had bumpers of unusual length. It was said by this court:

"It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the draw bars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to anyone. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

In French *et al v.* First Avenue Railway Co., 23 Pacific Rep., 1108, the syllabus reads:

"An experienced engineer, who had been employed in defendant's powerhouse for two days, ascended a platform between the winder wheels to oil the machinery, which work was a part of his duty, and while he was oiling he fell into the wheels and was killed. The platform on which he had to walk in order to reach the oil cups was in bad condition, and there was no guard rail to prevent him from falling if he lost his balance. The lights were also insufficient, and he took a candle with him to light him on his way. He knew the conditions and there was no danger which was not apparent to him.

"*Held.* That he assumed the risk, and the defendant's motion to take the case from the jury should have been granted."

The case of Detroit Crude Oil Co. *v.* Grable, 94 Fed. Rep., 73, 82, is a strong case on the doctrine of assumed risks as applied to this case.

This court in the case of Little Rock & Memphis Railroad Co. *v.* Moseley, 56 Fed. Rep., 1012, say:

"He (referring to the switchman) was simply bound to notice those obvious defects in the tracks, or in other appliances, which he had an opportunity to notice in the discharge of his duties as a switchman, and he is only affected with knowledge of such obvious defects as he is shown to have had an opportunity to notice before the injury complained of was sustained."

This declaration of law fits this case exactly. The opportunity to notice in the discharge of his duty was amply afforded to Tennessee. In addition to the opportunities which he had to observe this track on former occasions, at the particular time of the injury he had the fullest and most complete opportunity. He had his lantern in his hand; in adition thereto, the electric headlight lit up the whole yard, and he states himself that everything was as visible as if it had been in broad, open daylight. If it is possible to

conceive of a case where the duty devolved upon the servant to observe patent defects, if this may be called a defect, and if it is possible to conceive of a case where the servant had the opportunity to observe the condition of the roadbed, we certainly think that this is one of those cases. The plaintiff in this case did not have to make an inspection to ascertain the condition of these yards. He had been going in and going down by these yards all during the time of their construction; had passed around this lead track in the daytime in the discharge of his duty as head brakeman, and, on this occasion, it was so light that he could not but have observed the condition of the track, because it was patent and he had the fullest and completest opportunity to do so. In the Moseley case, we understand from the facts that the evidence did not show that the plaintiff had an opportunity to observe the defects, and in the Leverett case, *supra*, it was shown that this was the plaintiff's first trip in the yard, that it was nighttime and that he was performing the duty of an absent employee in uncoupling cars where it was necessarily dark. So, that we say if any case can be found where the declaration of law as to assumed risks as laid down in the Leverett case and the Moseley case can be applied, it certainly is in this case. We do not think that it is necessary to further multiply the authorities upon this proposition. As Mr. Bailey, in his work on the Master's Liability for Injuries to his Servants, p. 158, says:

"It is the duty of the servant, entering upon his service, to ascertain what he is expected to do, and the dangers directly connected therewith.

"As stated by a learned court: 'It is the duty of the servant to exercise care to avoid injuries to himself. He is

under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work where there is danger. He must inform himself. This is the law everywhere.'

"When he is a learner, and engages to work in a hazardous branch of the service, he must improve every opportunity furnished by the master to learn of his duties and their accompanying danger. If he fails, he is guilty of neglect. He must use reasonable care in examining his surroundings, to observe and take such knowledge of dangers as can be attained by observation. In performing the duties of his place he is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly. If he fails to do so the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes; and if the defect is obvious and suggestive of danger, knowledge on the part of the servant will be presumed, as well as when the dangers are the subject of common knowledge.

"The duty of the master, in such case, is not to see that the servant actually knows. He has a right to rest upon the probability that anyone would know what was generally to be seen by his own observation. So that in building his structures or conducting his business the master has the right to assume that the servant will exercise, in their use, ordinary care, and not unnecessarily expose himself to hazards not necessary or usual in his employment."

In Reed *v.* Stackmeyer, 74 F., 189, the court said:

"It is the duty of the servant to use ordinary care to ascertain the dangers attending the service in which he engages, and to protect himself against known dangers and such as can by ordinary care be ascertained. This duty is as imperative upon him as the duty laid upon the master. Wormell *v.* Railroad, 79 Me., 397; 10 Atl., 49."

How the plaintiff in this case could have brought himself any more squarely within the above doctrines we cannot understand. He states that in passing by these yards during their construction, he could have seen them if he had

looked. He knew the yards were under construction. It appears that all of the co-laborers of Tennessee who had been going in and out of these yards knew their condition perfectly, and Tennessee himself states that every part of the yard in which he had been was not filled in between the ties; that he was standing upon the very place where he was injured, and if he had only looked to his feet on this occasion he could have seen that the ties were not filled in.

But we do not have to rest our case here. If the evidence established conclusively that the railroad company had been guilty of actionable negligence in reference to the step and had been guilty of actionable negligence with reference to the construction of the yard, and that Tennessee had no knowledge of the condition of the step, and had no knowledge of the condition of the yards, and that he was at the time of the injury in his proper place, and in the proper discharge of his duty, yet notwithstanding all of that, the record in this case discloses that,

Tennessee was guilty of the grossest and most stupid contributory negligence.

In the case of Cunningham *v.* Chicago, M. & St. P. Railroad Co., 17 Fed. Rep., 882, the syllabus reads:

"A, in the employ of a railroad company as yardman, while engaged in his occupation as such, attempting to board the switch engine, with which he was working, by standing in the middle of the track and stepping on the rear footboard of said engine, which was approaching him, tender first, at a rate of from one to three miles an hour, but in the attempt, fell, was run over by the engine, and died from the effect of his injuries. The hand-rail on the rear end of the engine which was approaching the deceased, had been torn off the previous night and had not been replaced, and

the rear footboard of the engine in question was partly broken at one end. Suit was brought by the administratrix, the mother of the deceased, to recover the sum of five thousand dollars. The jury returned a verdict for one thousand dollars in favor of the plaintiff. Before the jury left the jury box a motion was made by the defendant to set aside the verdict.

"*Held.* That the act of so attempting to board the engine was clearly a case of gross contributory negligence on the part of the deceased, and the verdict should be set aside.

"When the jury brought in the verdict in this case, and before the jury was discharged, the defendant's counsel moved for a new trial on the ground that the verdict was contrary to the law and the evidence, and asked that the motion be then heard.

"The Court: I will hear the other side.

"Mr. Erwin: I would like to refer your honor to some authorities on the subject of contributory negligence.

"The Court: You may read them to the next judge who tries the case. I set this verdict aside. It was as clear a case of contributory negligence as has ever come under my observation, and it was with great reluctance that I refused to instruct the jury to find for the defendant. This is not only a case of clear negligence on the part of the deceased, but a case of stupid negligence on his part."

This case has been cited and approved by this court in Railway *v.* Davis, 53 Fed. Rep., 61. In delivering the opinion in that case Judge Sanborn said:

"The similarity of the negligent acts of the deceased in that case (referring to the Cunningham case) and in the case we are now considering, is striking, and the applicability of this rule of law to the facts of this case is obvious."

We think that the facts in the case at bar make a stronger case of contributory negligence than the Cunningham case. From the statement of that case, it appears that the plaintiff was attempting to step on the rear footboard of said engine. These footboards are provided so that switchmen may ride

thereon. The court will remember that Mr. Barnes explained very fully the difference in the equipment of yard engines which have a footboard in front of the engine for switchmen to ride on and road engines which have a footboard at the rear of the engine, and also this little step attached to the bottom of the cowcatcher so that brakemen might stand thereon and make what are known as pilot-bar couplings, and that these little steps were not intended to ride upon at all. Mr. Barnes testified that upon the Choctaw road the employees were prohibited from standing in front of a moving engine and attempting to get upon one of these footboards which are provided to ride on. So that we see that the facts in the case at bar make a grosser case of contributory negligence, because plaintiff was attempting to get upon this step which was not intended for brakemen to ride on, and at the time and under circumstances which made it considerably more dangerous than would have been under ordinary conditions. This case we think should be conclusive upon the question of the contributory negligence of the plaintiff in this case. The case of Kresanowski *v.* Railroad Co., 18 Fed., 229, so often cited by this court, is directly in point also.

Another case which we think is decisive of the question of contributory negligence in this case is Ry. Co. *v.* Jones, 95 U. S., 439.

The plaintiff in that case was one of a party of men employed in constructing and keeping in repair the roadway of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; sometimes, only a locomotive

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and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and was the conductor of the train which carried them both ways. When the party was about to leave one evening, the plaintiff was told by Van Ness to jump on anywhere; that they were behind time and must hurry. The plaintiff was riding on the pilot of the locomotive, and while there the train ran into certain cars belonging to the defendant and loaded with ties. It was held, for the purposes of that case, that the defendant was guilty of negligence in having or leaving the cars on the track with which the locomotive collided. The court held *that the fact that he was told to ride on the pilot of the engine was no justification for taking such a risk.* As well, they say, might he have obeyed a suggestion to ride on the cowcatcher or put himself on the track before the advancing wheels of the locomotive. The company, though, bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos.* The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. They held that the court should have instructed a verdict for the defendant.

The reasoning and doctrine laid down by the court in the case of St. Louis and San Francisco Ry. Co. *v.* Schumacker, 152 U. S., 77, also makes a clear case of contributory negligence on the part of Tennessee. See also St. Louis and San Francisco Ry. Co. *v.* Marker, 41 Ark., 542.

In the case of Finell *v.* Delaware, Lakawanna and Western Railroad Company, 129 N. Y., 669, the facts are so similar to this case and the reasoning of the court is so strong and particularly applicable to the case at bar, that we have decided to set out the opinion in full, which is as follows:

"In September, 1888, the plaintiff was a brakeman in the service of the defendant, and while attempting to couple a car to the tender of an engine upon a branch track, one of his feet was caught between two ties, and he was run over and very badly injured; and this action was brought to recover his damages.

"While this case appeals very strongly to our sympathies, we are unable to uphold this recovery. The plaintiff was an experienced brakeman and was acquainted with the locality where the accident happened. The branch track was not constructed for the purpose of running trains of cars thereon, but for the purpose of storing cars and making up trains. It was not ballasted like the main track, and at the place of the accident there were some ties between which there was no ballasting whatever. The condition of the track, however, was perfectly visible, as it was broad daylight at the time of the accident. The plaintiff was upon the tender of the engine as it backed from the main track upon the branch. He had entire control of the movements of the engine, and could order it to be stopped at any time by a motion of his hand to the engineer, and thus it was backing upon the branch track under his direction. As it backed for several hundred feet the condition of the track was plainly visible to him, standing upon the brakebeam at the rear of the tender. It backed at the rate of about two miles an hour, or about half as fast as a man would ordinarily walk. It became necessary for the plaintiff to draw an iron bolt and take out the link which was in the drawhead of the tender, throw it over the hook which was in the drawhead of the car, and thereafter it was to be replaced in the drawhead of the tender and there fastened by the bolt. At a short distance from the car, while the tender was thus being backed, he jumped off the tender into the middle of the track, and attempted to remove the link from the drawhead while he was slowly walking back between the tender and the car, and as he was thus walking he claims that his foot was caught between two

ties, his toe partly under one and his heel against the other, and that it was thus fastened so that he could not withdraw it, and that the wheels of the tender passed over his legs. He claims that the defendant was negligent in not ballasting this branch of the track, so as to make it safe for him to walk thereon to discharge his duties as brakeman while standing thereon. *But we do not understand that the railroad tracks are ballasted for the purpose of making them safe for brakemen to walk upon but for the purpose of making them firm and safe for the passage of trains, and we do not think the defendant neglected any duty it owed to plaintiff in not ballasting the track at the place where the incident occurred.* It is not claimed that there was any trap in the track, or that the track was in any respect defective or dangerous, except in that it was not ballasted. A brakeman is engaged in a business attended by many risks, and it is difficult to see how this recovery can be upheld without casting all the risks of the employment upon the railroad company.

"But still further, the plaintiff was clearly guilty of contributory negligence. There was no rule of the company and no emergency that made it necessary for him to walk between the tender and the car while the engine was in motion, for the purpose of removing the link. The engine was under his control. He could have remained on the tender or on the side of the track until the car and tender were brought near together, and then he could have stopped the engine and drawn the link and made the coupling without danger. He knew the condition of the track, as it was before him perfectly visible, and he took the chances of walking upon the track while he was engaged in withdrawing the link, the engine being in motion, and thus he did an unnecessarily careless thing which contributed to this most unfortunate accident. This case is like that of the Pennsylvania Co. *v.* Hankey (93 Ill., 580), and that case is a very precise authority for the conclusion we have reached. This case is unlike that of Plank *v.* N. Y., C. & H. R. R. Co. (69 N. Y., 607). There, in the nighttime, the plaintiff's intestate was directed by the conductor of the train to couple some cars on the side track, and while engaged in so doing he stepped into a sluiceway or trench across the track, about two feet wide and deep, which was walled up with stone on each side. There was a trap left in the roadbed which rendered the track dangerous to any employee of the company who had occasion to be there in the nighttime, and there it was very properly

held that it was a question of fact for the jury to say whether the track was an ordinarily reasonable safe place for the performance of a brakeman's duties. This is more like the case of Appel *v.* B., N. Y. & C. R. Co. (111 N. Y., 550), where plaintiff's intestate, a switchman, employed in defendant's yard, in helping to make up and distribute trains, while engaged in his employment, caught his foot in a 'frog' which connected two converging tracks, and was used to effect the transfer of cars from one track to the other, but before he could release himself he was run over and killed. In an action to recover damages for his death, it was claimed that blocks of wood could be placed in the openings of frogs and thus prevent such accidents. It appeared that the intestate had been in the defendant's employ for some years, and for quite a length of time in and about the yard where the accident happened, and was acquainted with the frog and knew that it was not 'blocked,' and it was held that the intestate in accepting and continuing in the employment assumed the hazard of all known and obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in the frog, or of the danger apprehended therefrom; and, therefore, that a cause of action was not made out and the refusal to nonsuit was error. Here, in this case, it cannot be said that the track was obviously dangerous to a prudent brakeman. The accident was a very unusual one, not likely to occur, and easily guarded against by any brakeman carefully discharging his duties. Knowing the condition of this track, he should not have walked upon it, except with the greatest circumspection. As the engine was entirely under his control, he could either have stopped it or had it move so slowly that no accident could come to him.

"We are, therefore, of opinion that the judgment should be reversed and a new trial ordered, costs to abide event."

Judgment reversed.

This case is in direct line with the decision of this court in Morris *v.* Duluth S. S. & A. R. R. Co., 108 Fed. Rep., 747.

The opinion in the case of Pennsylvania Company *v.* George Hankey, 93 Ill. Rep., 580, is strikingly similar to this case, and we also set out that opinion in full, which is as follows:

"This is an action brought by Hankey, appellee, against the Pennsylvania Company, appellant, to recover damages for an injury suffered by him, and alleged to have been caused by the negligence of the appellant. That corporation was operating the Pittsburg, Fort Wayne and Chicago Railroad.

"Appellee was in the service of appellant as a brakeman on freight trains. At the time of the disaster appellee, as such brakeman, was preparing to couple an engine and tender to a train of empty cars then standing on the side track at or near Englewood. This side track consisted of ties and rails laid upon a graded or level bed but without ballast,—the spaces between the ties not being filled with earth or gravel and being about six inches deep. The engine and tender were backing on this side track and plaintiff, while the same were in motion, tried to change the link at the rear of the tender. In making this attempt one of his feet was caught between one of the ties and the brakebeam at the rear of the tender, and he was thereby cast down in such position that the wheels of the tender passed over both his feet and so crushed them that it became necessary to amputate both his legs below the knees.

"A trial by jury was had, resulting in a verdict for the plaintiff and the assessment of his damages at the sum of $10,000. A motion for a new trial was refused and judgment rendered upon the verdict. This is an appeal from that judgment.

"Appellant insists that there is no evidence of wrong on the part of its management,—that plaintiff was guilty of negligence and that the injury was the result of his own folly.

"The only fault attributed to appellant consists in the failure to have this side track ballasted, and this upon the ground that (as it is insisted) ballasting was essential to the safety of its employees. It is urged that the spaces between the ties should be filled with earth so as to make a comparatively smooth track for them to walk upon in the discharge of their duties. This side track was built and used solely as a place for temporarily storing cars not in use. It was about two miles long and lay west of and but a short distance from the main tracks and nearly parallel to them, and was connected with the more westerly of these main tracks by a switch at the south end of the side track. The main tracks were well ballasted and smooth and so was that part of the south end of the side track which was at the switch and near to it; but north of that there was no ballasting and the spaces between the ties of the side track were wider apart than those

of the main tracks, being irregular and from two to three feet wide. This disaster occurred some fifty to eighty feet north of the switch — probably about seventy feet — and at that point the track was without ballast. At that time the engine and tender were backing northward slowly, moving not more than three miles an hour.

"The party of employees of whom Hankey was one, consisted of a conductor, engineman, fireman, and two brakemen. They came from Chicago for the purpose of taking a train of empty cars from this side track with an engine, tender and caboose,—the conductor and brakemen riding in the caboose. Traveling south on the more westerly of the main tracks they passed the train of empty cars on the side track, and on approaching the switch the caboose was cut off and left on the main track about one hundred feet north of this switch. The engineman, the fireman, and Woodworth (one of the brakemen) went on with the engine and tender, while the conductor and plaintiff got off the caboose and walked westward, the conductor to look after the numbers of the empty cars to be taken, and Hankey to put himself in readiness to couple the tender to the empty freight cars when the engine should be switched on to the side track and backed up to the south end of these empty cars.

"It was Hankey, the plaintiff, who cut off the caboose from the tender before it reached the switch going north and in so doing he took out the back pin, thus leaving the link attached to the tender. This link was a crooked or bent pin used in cases where the cars to be connected are not of the same height. It seems by the testimony of plaintiff that on leaving the caboose he went westward and was about to cross the side track at a point about forty feet north of the switch, when he was told by the conductor (who at that time had crossed the side track a little farther north) to change the link and that plaintiff at once returned to the caboose and there got a straight link and again went westward, crossing the side track before the engine at that point. As the tender was backing up he stepped into the track and attempted to walk back on the track while changing the links. He had made but three or four steps when his foot was caught, as stated above, and he was rendered a cripple for life.

"It is not shown affirmatively that common prudence demanded that a side track, used solely as a place for the temporary storing of cars should be ballasted. It is shown that such a track is 'not safe for brakemen to walk upon in coupling cars,' etc., but it nowhere appears that it was the

duty of brakemen to walk on the track while changing links or coupling cars on such a track.

"It is not shown, and no testimony contradicts this, that the engineman in switching and coupling is under the direction of the brakeman who has to do the coupling; that the brakeman in such case might halt the engine when, in his discretion, it ought to be halted, or may, by signals, cause it to move slower or faster as he thinks proper. The witnesses for plaintiff show plainly that a side track without ballast is unsafe for the brakeman to walk upon in changing links or coupling cars. No rule of the company is offered requiring brakemen to walk on such a track under such circumstances. It is not claimed that plaintiff was ordered by the conductor to do so. Plaintiff testifies that the conductor told him to 'change the links.' This in no sense can be held to mean that he should do so when the engine and tender were in motion. At that moment the engine and tender must have been south of the switch. If, as plaintiff's witnesses testified, this side track was in such condition that it was unsafe to change the links when the tender was in motion on that track, plainly it was the duty of plaintiff to have halted the engine before trying to change the link; or to have postponed the attempt to make the change until the tender reached the empty cars and had there become still.

"It is said, however, that plaintiff not being acquainted with this side track, had a right to assume that it was ballasted, and therefore might properly change the links as he did, the proof showing that it is not unusual to change the links when the cars are in motion.

"There are some difficulties in the way of adopting this position. This disaster occurred in broad daylight, and the plaintiff had walked to this track from the caboose, had seen the conductor cross it, and after going back to the caboose for the straight link, had returned and crossed it himself not more than twenty feet from the place of the accident, and hence the evidence does not tend to prove plaintiff in fact supposed that this track was not ballasted. He was himself a witness, and does not undertake to say that he did not observe that this track was without ballast. Again, we have often decided that travelers when about to cross or walk on a railroad track are required by common prudence to look and see whether any train is approaching. It would seem that a brakeman about to change links when the train is in motion must be required by common prudence to look, if he can, and

see what kind of a track he is about to pass over. Again, he had surely no reason to assume or suppose that this side track was ballasted, unless by the custom of railroad companies such tracks were very generally, if not universally, ballasted. In this case, defendant offered to prove that it was not unusual for railroad companies to have in use unballasted side tracks, but at the instance of plaintiff the court refused to allow the proof to be given. This evidence was surely competent on the question as to what vigilance was required in a brakeman under such circumstances. If it be true that an unballasted track is unsafe for a brakeman to walk on for the purpose of changing links where the cars are in motion and moving towards him, and if it also be true that unballasted side tracks are not unusual, it must follow that ordinary prudence requires a brakeman, before undertaking to do that dangerous thing, to ascertain, if practicable, whether the track in question is or is not ballasted, and if it be not ballasted, ordinary care plainly requires that before attempting to change the links he should cause the moving cars to halt, and wait until they are at rest, before venturing upon the undertaking.

"In view of the proof in this record, and the ruling of the court in refusing to permit the defendant to prove that it was not unusual for railroad companies to have in use side tracks without ballasting, we think the motion for a new trial ought to have been sustained, and for the error in refusing a new trial, the judgment in this case must be reversed and the cause remanded for a new trial."

Judgment reversed.

The case of Andrews *v.* Birmingham Mineral R. Co., 12 Southern, 432, is a case also directly in point, and we quote the opinion in that case in full, as follows:

"Appellant was a brakeman in the service of appellee. As the locomotive drawing one of appellee's trains approached a switch on the main line in the company's North Birmingham yard, he was standing on the foot braces on the pilot of the locomotive, which were twelve or fifteen inches long, and were intended for brakemen to stand on when switching. It was 10 o'clock at night. When about forty feet from the switch appellant says he saw it was thrown wrong for the train, and was ready to jump, when the engineer called out, 'Andrews, look out for that switch.' He then jumped on

the track in front of the engine and took three steps toward the switch when his leg went into a hole in the roadbed and he fell. The engine was moving at the rate of from three to five miles per hour and slowing up when he jumped off. By reason of the fall he was overtaken by the engine, run over, and injured. The hole into which he fell averaged at least three feet deep for the distance of eleven crossties, and looked appellant testified, like a trestle had been there. Appellant had never seen the hole before and did not know it was there until he fell into it. He examined it afterwards. The testimony also tended to show that 'where he jumped off, and thence in the direction of the switch, the track was on an embankment, which sloped off on the right side; that on the right there were two other tracks, about six feet apart, and the embankment on which was the main track, outside of rails of track, was covered with hunks of slag and cinder,' some of which weighed probably one hundred and fifty or two hundred pounds. On the left of the track it was narrow, being about two feet wide, and nearly perpendicular. Switch was on the left side. The roadbed between the rails where appellant undertook to go in advance of the engine was apparently level. There was no light there, except the headlight of the engine and the appellant's lamp, which he had with him. It was appellant's duty to attend to switches for that train on the occasion in question. There was other evidence tending to show negligence on the part of the defendant company in respect to the existence of the hole in the roadway.

"The cause of action relied on is the defective condition of the roadway, in that the hole in which appellant fell was negligently permitted to be and remain thereon. The defense relied on is contributory negligence. That defense was not specially pleaded, but the parties, without objection, actually tried the case upon that issue which brings it within the rule announced by this court in Farmer's case, 12 Southern Rep., 86 (at the present term). The filing of the special plea was thus waived by the appellant. The special act on the part of appellant insisted on by defendant as constituting contributory negligence was the act of jumping off on the track in front of the moving engine, and undertaking to go upon the track to the switch. As pertinent to the inquiry whether such conduct on his part was negligence or not, he offered to prove by his own testimony that it was the custom and practice on defendant's road, and on well regulated railroads, for brakemen when doing switch work in the

yard limits to stand and ride on the pilot of the engine, and to leave the pilot to do switching before the engine came to a full stop, and to show it was the custom and practice of engineers on defendant's railroad and well regulated railroads not to bring their engines to a full stop for brakemen to leave the pilot when doing switch work. The court sustained an objection to the introduction of this testimony, and appellant excepted. In Warden *v.* Railroad Co., 94 Ala., 277; 10 Southern Rep., 276, we use this language: 'The fact that one is in the habit of doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is negligence *per se* for persons to walk on the track of railroads. Doubtless, many persons are in the habit of using the track in this way. Yet, it has never been supposed, and it cannot be the law, that such custom would convert the track, which the law declares *per se* to be a dangerous place, into a safe place. * * * Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, and resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, yet custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent.' A number of authorities are there cited in support of what was said. In Railroad Company *v.* Burton, 12 Southern Rep., 88 (at the present term), the law in reference to the admissibility of custom and usage of railroads as affecting the question of negligence, is also fully stated, to which we refer without quoting. Under the evidence in this cause, we are of the opinion that the plaintiff's conduct in attempting to go to the switch on the track in front of the moving engine, under the circumstances detailed by himself, involved obvious peril of his safety, and was *per se* negligence, which under the principle declared in Warden *v.* R. R. Co., and R. R. Co. *v.* Burton, *supra*, could not have been relieved by proof of the custom which he offered to introduce. It follows, conceding the existence of such a

custom, the defendant was entitled to the general affirmative charge which the court gave. The judgment of the city court is affirmed."

The plaintiff in the above case seemingly acted on the spur of the moment, without opportunity of mature consideration, but plaintiff in the case at bar, by his own testimony, had ample time to carefully consider his surroundings and the probable results of his contemplated action.

The following are interesting and strong cases on the question of contributory negligence as applied to the facts in this case:

Gleason *v.* Railroad, 73 Fed Rep., 647.
Kroy *v.* Railroad, 32 Iowa, 357.
Thompson *v.* Railroad, 153 Mass., 391.
Batterson *v.* Railroad, 53 Mich., 125.

We especially invite the court's attention to Rogan *v.* Railway Co., 97 Mich., 267, as it completely covers several phases of this case.

If we concede that Tennessee had any duty to perform at the time and place he was injured, there were two other ways in which he could have performed this duty with safety to himself and avoided taking any chances whatever. First, he could have signaled the engineer to stop until he had obtained a foothold upon the step, and second, he could have gotten on the steps leading to the cab of the engine, or he could have gotten upon the footboard in the rear of the engine, or he could have caught the first car behind the engine. In each and all of these places, steps and footboards were supplied upon which brakemen could ride with safety, and in taking either of these positions it would have been

unnecessary for him to have taken a position in front of a moving engine on the inside of the rails.

In the case of Morris *v.* Duluth S. S. & A. R. R. Co., 108 Fed. Rep., 747, this court said:

"When there is a comparatively safe and a more dangerous way, known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and thereby assumes the risk of the injury which its use entails."

In the case of Ry. *v.* Davis, 53 Fed. Rep., 63, this court said:

"If he voluntarily and unnecessarily places himself in a position that he knows is dangerous, or that an ordinarily prudent man in his position would know was dangerous, and is thereby injured, when there are other positions that he might have taken in the discharge of his duty that are safe, he cannot recover of the defendant, although the latter is in some degree negligent. He cannot recklessly and unnecessarily expose himself to a known danger, and then recover for an injury to which such exposure contributed."

This doctrine was reiterated and reinforced by many citations in the case of Union Pacific Railway Co. *v.* Jarvi, 53 Fed. Rep., 68.

In Lothrop *v.* Fitchburg Railroad, 150 Mass., 424, the court said:

"The general rule of law is, that when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by anyone else, and when the servant has as good an opportunity as the master or anyone else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care."

In the case of Gowen *v.* Harley, 56 Fed. Rep., 983, this court said:

"Where there is a natural and safe method of performing his service, and the servant carelessly pursues a method that is obviously more dangerous, he is guilty of contributory *negligence, and cannot recover.* Russell *v.* Tillotson, 140 Mass., 201; 4 N. E. Rep., 201."

In Motey *v.* Pickle Marble and Granite Co., 74 Fed. Rep., 159, the court said:

"If the negligence of the servant was one of the proximate causes of his injury,— if his own negligence contributed to the unfortunate result,— he cannot recover of his master, even though the negligence of the master also contributed to it."

Many other authorities might be produced along the same lines of the foregoing, but we do not consider it worth while to worry or tax the patience of the court further along this line. As we remarked in the outset, we think that the charge of the court to the jury in effect amounted to a peremptory instruction, and that the verdict of the jury was contrary to the evidence. In this connection, we do not care to say anything further than to ask the court to read the charge of the court to the jury, found on pages 9 to 21, inclusive, and then apply it to the evidence as found in the record, and as we have undertaken to set it forth in this brief.

But beyond all this, the record shows plainly that neither the step nor the fact that the crossties had not been filled in, contributed in any way to plaintiff's injury. We get this from plaintiff himself. In the letter he wrote to Mr. Wood, he says: "I slipped off the front end of an engine," and in his written statement to Mr. Vaughan he says: "I jumped on the pilot as the train was running three or four miles an

hour, and my left foot slipped and fell *between the pilot and the rail.*" This is from the two written statements which Tennessee made regarding this accident soon thereafter, and are supported and substantiated by his verbal statements to the other witnesses who have testified. No mention was ever made or suggestion ever heard that the accident was in any way due to a defective step or to a defective condition of the track until the filing of this suit. It will be remembered that the step commences about six or eight inches from the point of the pilot and is about eighteen inches long. Tennessee says he stepped just inside of the rail to get on, and if he did he undertook to get on that end of the step next to the rail. This would throw the point of intersection of the pilot and the rail such a very short distance from the place where he slipped off, that the very second he fell he would necessarily be caught in this angle and it would simply be impossible for him to extricate his foot. The idea that he had time to make the effort to get out, which he says he did, and then deliberately give up and let go, as he expresses it, while an engine traveling at the rate of four miles an hour was going a distance of two or three feet is preposterous. An engine going four miles an hour travels about six feet in a second, and this would only give Tennessee one-half of a second to do all that he claims he did. He couldn't go through the mental process he describes in that time and the conclusion must be that he was caught between the bottom of the pilot and the rail almost the instant he fell, and this regardless of the condition of the ties.

For the foregoing reasons, we think that the 1st, 2d, 3d, 4th, 22d, 29th, and 31st assignments of error are well

founded, and that the case should be reversed and dismissed for want of evidence to support the verdict.

II.

The court clearly erred in that part of its instruction contained in the 5th assignment of error. The duty a master owes to its servants is not to furnish machinery in a reasonably safe condition, etc., but only to exercise ordinary care to furnish machinery, etc., in a reasonably safe condition. This is the law everywhere. This precise question was presented in the case of L. & N. R. R. Co. *v.* Johnson, 81 Fed. Rep., 679, and the case was reversed and remanded for a new trial for that error. The court there said:

"In respect to the duty of the railroad company the court erroneously instructed that the company 'undertook to furnish the plaintiff a reasonably safe place to work,' and to maintain the same. The instruction in full appears in the margin. The rule is well settled, and as early as 1894, in Railroad Co. *v.* Meyers, 24 U. S. App., 295; 11 C. C. A., 439, and 63 Fed. Rep., 793, had been declared by this court, that 'the master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servants with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair.' See, also, same case on second appeal, 46 U. S. App., 226; 22 C. C. A., 268, and 76 Fed. Rep., 443. In this case the question whether the railroad company was chargeable with negligence was, to say the least, close, depending upon the inquiry whether the space between the rail and board had become, or perhaps was by construction, of such necessary width as not to be reasonably safe, and whether the fact was so manifest and so long continued that in the exercise of due care the company ought to have discovered the defect in time to remove it. The error is emphasized by the terms in which the instruction concludes: 'If, while exercising reasonable care, his injury was brought about, the failure of the company to pro-

vide a reasonably safe place for him to do his work, the company is liable. That is the very crucial question for you to decide in this case.' It was, therefore, more important that an accurate definition and explanation of the company's duty should have been given to the jury. The error was not corrected by other portions of the charge, which, though implying the true rule, were not sufficient to prevent misunderstanding on the part of the jury. For instance, the jury were told that if they found that the defendant failed or neglected to keep its track at the place of the injury in a reasonably safe condition, and such condition was known to the defendant, or by the exercise of reasonable diligence could have been known to the defendant, etc., they should find the defendant guilty. In so far as this indicates that the defendant was bound only to ordinary diligence to discover defects caused by use it is perhaps sufficiently accurate; but the repeated and erroneous statement of the primary duty — to provide a safe working place — was left unmodified and unexplained. When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake."

This error was repeated several times by the court in the course of his charge. The error is corrected to some extent as to the step in the last paragraph on page 20 of the court's charge, but we do not think this is sufficient to correct so plain an error, as the whole charge was predicated upon that portion excepted to as being the measure of the master's duty to his servants. If this paragraph can be said to correct the error as to the defect in the step, it does not in any way correct the error so far as the condition of the yards is concerned, and if the case was to be submitted to the jury at all we think that it should have been submitted upon instructions in this respect which should have been absolutely without error or in any way misleading.

In the case of Railroad Co. *v.* Needham, 69 Fed Rep., 823, this court (quoting from syllabus) said:

"The extent of the duty of the master to servant in matter of place of service is to exercise ordinary care to furnish him a reasonably safe place and to use ordinary care and diligence to keep it in a reasonably safe condition, and it is error for a court to charge the jury that it is the master's duty to furnish the servant a reasonably safe place. This court has repeatedly so held."

III.

The court clearly erred in that part of his charge referred to in the 6th assignment of error (by some mistake there are two 7th assignments of error, but it is the first one we have reference to, Tr., p. 115) for the reasons, first, that it states a broad proposition which is not in all cases true. It may be that a railroad company in large railroad yards would be held to a greater degree of diligence with reference to some of its employees than it would to others, but we know of no rule of law which requires railroad companies to put their tracks in shape for any of its employees merely "to walk to and fro in crossing the track;" second, conceding that the court correctly stated the duty of the railroad company with reference to furnishing tracks for its employees "to walk to and fro in crossing the track" that is not by any means a measure of the duty of the plaintiff in this case to the defendant Tennessee; and, third, because there is nothing in this record which would make it obligatory upon the railroad company to furnish Tennessee safe yards in "walking to and fro in crossing the track;" fourth, because the instruction is abstract and there is nothing in the record upon which to base such an instruction. The proof shows that these yards are for the purpose of storing cars, and we do not know of any

authority anywhere which holds that a railroad must undertake to put its yards in a safe condition for its employees to walk to and fro in crossing the tracks. There was absolutely no proof in this case that any of the company's employees had any business in walking to and fro in crossing these tracks.

Finell *v.* D., L. & W. R. R. Co., 129 N. Y., 669.

IV.

The court erred in that part of its instruction contained in the 7th assignment of error which told the jury that if the plaintiff contributed in any "*considerable*" degree to his injury he could not recover. This is clearly the doctrine of comparative negligence which does not obtain in this jurisdiction. The court should have told the jury that if the plaintiff by his negligence contributed in *any* degree to his injury he could not recover.

In Railroad *v.* Marker, 41 Ark., the rule is correctly stated as follows:

"If the employee is guilty of *any* want of care, whereby he unnecessarily exposed himself to danger, and he is injured thereby, he cannot recover from the railway company."

The rule is thus tersely stated in Pennsylvania:

"That any degree of negligence on the part of the plaintiff contributing to the injury, destroys his right to recover. It is the kind of action, not the quantity, on the part of the plaintiff, which prevents the law from measuring between the plaintiff and defendant their respective degrees of negligence, when the former comes into a court of justice."

Oil City Fuel & S. Co. *v.* Boundy, 122 Pa. St., 449.

Bailey's Liability for Inj. to Ser., p. 413.

V.

The court clearly erred in that part of its instruction contained in the 8th assignment of error, for the following reasons:

1. There was no evidence to the effect that it was the duty of the plaintiff to get on the front of the engine while in motion. The only contention upon the part of the plaintiff on this proposition was that he was accustomed to ride on this plate sometimes in the performance of what he claimed was his duty, and that he and some other of the employees in performing that duty were in the habit of mounting the engine in the way that he attempted to get on it at the time that he was injured.

2. There was no evidence that he had been in the habit of being directed to do so by his superior officers whose command he was bound to obey, but on the contrary he stated that no one had ever told him to do that, and even if he had been commanded by some officer of the company in authority he would not have been justified in doing it if he could see it was dangerous and known to him to be dangerous.

Railway *v.* Jones, 95 U. S., 439.

Oil City Fuel Supply Co. *v.* Boundy, 122 Pa. St., 449.

This court, in the case of Railroad *v.* Reesman, 60 Fed Rep., 371, said (quoting from syllabus):

"The mere knowledge and assent of the conductor of a train to a violation by a brakeman on the train of a rule of the company requiring him to be on top of the car, in order to give signals to the engineer, does not exonerate the brakeman from the charge of contributory negligence for injuries received by him in consequence of his violation of such rule."

In the case of Thompson *v.* Railroad, 153 Mass., 394, the court said:

"But we understand that the offer (referring to a practice of brakemen jumping from a moving train) was to show that they did so without looking, or being able to look, to see where they would light, or what obstructions they would meet. If they thus acted, it would only certainly prove that they were habitually reckless and careless. They could not by such conduct make the railroad responsible for the injury occasioned them thereby, even if it met with the approval of the superintendent."

3. Because it eliminated from the consideration of the jury the question as to whether it was contributory negligence on the part of the plaintiff to attempt to mount the step when it was raining and the engine was slippery. One of our contentions is that if all the conditions which Tennessee claims had existed, and that if ordinarily he had been justifiable in mounting this step, yet on this occasion it had been raining all day and that the engine was slick, and for this reason alone (if there were no other reasons) it rendered it a dangerous and imprudent act for the plaintiff to undertake.

4. On the question of its being contributory negligence to mount the step on account of its being slippery, see the 20th assignment of error, in which the defendant asked the court to instruct the jury that they might take into consideration the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, etc.

5. And for the further reason that the charge instructed them that if he was injured by reason of the fact that either the step broke or gave way and he was injured, that the company would be liable, etc., without instructing

the jury also that so far as the plate was concerned the railroad company only owed the plaintiff the duty to use ordinary care to see that the plate was safe.

VI.

The court clearly erred in permitting the witness to testify as set out in the 9th, 11th and 13th specifications of error, for the reason that the condition of the step a short time before or a short time afterwards could not in any way tend to establish what the condition of the step was at the time of the accident.

R. R. Co. *v.* Hawthorne, 144 U. S., 202;
Shinners *v.* Proprietors of Locks and Canals, 154 Mass., 168;
Motey *v.* Pickle Marble and Granite Co., 74 Fed., 159, and cases cited.

VII.

The court erred in permitting the plaintiff to testify as set out in the 10th and 16th assignments of error, for the reason that there was no proper foundation laid for the testimony, as the evidence showed that the witness was a switchman and fireman, and did not show that he had any knowledge or experience as to how railroad yards should be constructed, and for the further reason that we think that the question of the construction of the yards under the proof in this case was purely a question of the most practicable way to build a railroad yard, and was not under the facts herein a matter that should be left to the discretion of the jury.

VIII.

The court erred in permitting the witness to testify as set out in the 12th specification of error for the reason

that the proof showed that before and immediately after the accident that the step was inspected and found in good condition, and there was no proof to show that the railroad company had not used ordinary care to furnish a safe step. No defect in the step at the time of the injury was shown.

IX.

The court erred in permitting the witness Wesley Graves to testify as set out in the 12th specification of error for the reason that the indulgence by witness in a dangerous practice would not justify the plaintiff in indulging in the same practice, and would not afford any criterion or measure of the liability of the railroad to plaintiff in this case.

Thompson *v.* Railroad, 153 Mass., 394.

X.

The court erred in refusing to allow the witness to answer the question asked him as set out in the 15th specification of error, for the reason that the proof shows that the road at this time was undergoing a state of reconstruction, and knowledge of the condition of yards at other places at that time would have imputed to plaintiff some knowledge, or, at least, put him on notice as to what the condition of this yard was.

XI.

The court erred in refusing to give the instruction set out in the 17th assignment of error, for the reason that it clearly sets forth the burden of proof which rests upon plaintiff in reference to establishing any negligence on the part of the railroad as to the condition of the step.

Ry. *v.* Baker, 67 Ark., 531.

XII.

The court erred in refusing to give the instruction set out in the 18th specification of error. We think the plaintiff was guilty of contributory negligence in attempting to mount said step, for the reasons already set forth.

XIII.

The court erred in refusing to give the instructions as set out in the 19th, 21st, 23rd, 24th, 26th, 29th and 30th specifications of error, for the reasons set out in the argument heretofore made upon the question of assumed risks and contributory negligence.

XIV.

The court erred in refusing to give the instruction set out in the 20th specification of error, for the reason that it directed the attention of the jury to certain circumstances which they should take into consideration in determining whether the plaintiff was guilty of any acts of contributory negligence, and the necessity for this instruction is further emphasized by the fact that the court's instruction as set out in the 8th assignment of error, eliminated from the consideration of the jury the question as to whether it was contributory negligence on the part of Tennessee to attempt to mount the step at a time when the step was wet and slippery. If this was not an act to take into consideration in determining whether plaintiff was guilty of contributory negligence, then it would be hard for a jury to know what acts they were to consider, and the court having eliminated the slick condition of the steps, it certainly must have left the jury somewhat confused to say the least of it.

XV.

The court erred in refusing to give each of the instructions set out in the 25th and 27th specifications of error, for the reasons set out in said instructions, and for the reasons given by this court in Gowen *v.* Harley, 56 Fed., 973.

XVI.

The court erred in refusing to give the instruction set out in the 28th assignment of error, for the reason that it is *per se* negligence for an employee of the company to violate one of its established rules with reference to negligent acts.

XVII.

The opinion of the Circuit Court of Appeals and the dissenting opinion of Judge Sanborn are found in the record at pages 127 to 134.

Only two witnesses appeared in behalf of the plaintiff —the plaintiff himself and Wesley Graves. The plaintiff entered the employ of the defendant in December, 1899 (R., p. 25), which must have been on or subsequent to December 10, as the defendant, Choctaw, Oklahoma and Gulf Railroad Company, did not own or operate the road prior to that date. Witness Thomas Cuneo testified as follows (R., p. 55):

"Q. When did the Choctaw Company take charge—the first of November, didn't they?

A. They took charge the 10th of December, and this was in February."

Prior to that time the road was owned and operated by the Little Rock and Memphis Railroad Company. Witness Wesley Graves entered the service of the old company in

1888 (R., p. 46) and continued in the service of the Choctaw Company after it acquired the property from the old company. It is important to remember these facts.

The court, in summing up the evidence introduced on behalf of plaintiff, says (R., p. 128):

"That he had never received instructions not to ride on the front end of an engine in the manner described, but, on the contrary, had often been commanded by conductors to so ride; that the only rule on the subject which had ever been prescribed by the defendant company that he ever saw was a rule warning its employees not to jump on or off an engine when it was running at a high rate of speed."

There is no evidence whatever in the record that plaintiff had ever been commanded by a single conductor to ride on the front end of an engine, nor is there any evidence to support the statement "that the only rule on the subject which had been prescribed by the defendant company that he ever saw was a rule warning its employees not to jump on or off an engine when it was running at a high rate of speed." The exact evidence touching these points is as follows:

WESLEY GRAVES, on direct examination (R., p. 43), testified:

"Q. Were there any objections against the head brakeman riding on this particular place from the officers of the company, that you heard of?

A. No, sir.

Q. Do you know of any rules against it?

A. I don't know of any rule to prevent a man from riding on there when they instruct him *to ride* on there."

On cross examination he testified (R., pp. 43 and 44):

"Q. Do you profess to know what the rules of this company are?

A. The Choctaw?

Q. Yes, sir.

A. No, sir; I don't profess to know the Choctaw rules.

Q. Then what you said, you were just stating what the rules were on other roads?

A. What I said was riding on the front end of an engine. That's Choctaw rules.

Q. Do you say the Choctaw rules require them to ride on the front end of the engine?

A. Yes, sir; that's the instructions from the conductors.

Q. Did you ever see a book of rules?

A. Yes, sir; I have seen some books of rules.

Q. I wish you would point me out a rule that requires them to ride on the front end of an engine. Did you ever see a rule of that kind?

A. Yes, sir; I have seen that book of rules, but I never read them.

Q. Is it not a fact that there is a rule which prohibits employees from stepping up on the front end of an engine as it approaches them?

A. There is a rule which prohibits them from stepping up on the front end of an engine when it is going at a high rate of speed.

Q. Please read Rule 202 from the general rules and regulations of the operating department of the Choctaw, Oklahoma and Gulf Railroad, November 11, 1898.

A. We weren't using them.

Q. Don't you know that they were using these rules?

A. They weren't at that time.

Q. What rules were they using?

A. We were working under the standard rules.

Q. Are these the standard rules (referring to book of rules set out above)?

A. Yes, sir; those are the standard rules all right.

Q. If you were working under the standard rules and these are the standard rules, you were working under these rules, weren't you?

A. Well, what's that you want me to read?

Q. Read the rule.

Court: You were asked to state whether it was not against the rules of the Choctaw Company for any brakeman to ride on that step there when the engine is approaching, except when they are attaching the engine to cars, or coupling.

A. I am satisfied I never had any instructions not to ride on the front end of the engine coming in on a track. I always had instructions to ride there.

Court: How did you get that instruction?

A. I got it from the conductors.

Court: Not from the rule book?

A. I don't say I could find it in the rule book.

Court: Did you ever see it in the rule book? Did you ever see a rule book?

A. Yes, sir; I have seen rule books.

Court: Did you ever notice in there what the rule is?

A. Well, I don't remember just exactly what the rule is.

Mr. Peirce: Q. Read rule 202."

(Witness read rule as follows: "Employees are warned not to catch on to the front or rear end of the engine as it approaches them, to jump on or off trains or engines moving at a high rate of speed, to get between cars in motion to uncouple them, or to follow other dangerous practices.")

THOS. TENNESSEE testified (R., p. 47):

"Q. Did you ever have any of those printed rules, like that book?

A. No, sir; I never saw one until after I got hurt.

Q. You never got any printed rules of this company?

A. No, sir.

Q. What was the number of the engine you say you were on?

A. C., O. & G. engine No. 5.

Q. Do you know what make it was?

A. Rhode Island."

Cross-examination:

"Q. You know that all railroads generally have rules?

A. Yes, sir; all the railroads I ever worked for in my life furnished me with a copy of the rules before I went out.

Q. You know then as a general rule railroads have rules?

A. Yes, sir."

Redirect-examination:

"Q. Did you ever hear of any rule that prevented the head brakeman from riding on the front end of the engine into a yard?

A. Never did in my life, any further than what is said in all general rules about an engine going at a high rate of speed. I have got days for not being on the front end of the engine coming into a yard.

Q. What do you mean by getting days?

A. They would pull me off from my work and lay me off ten or fifteen days.

Q. Trying to punish you for not riding on the front end?

A. Yes, sir."

It appears, then, that it was Wesley Graves who "had often been commanded by conductors to so ride," and it appears also that it was Wesley Graves who stated that "the only rule on the subject which had ever been prescribed by the defendant company that he ever saw was a rule warning its employees not to jump on or off an engine when it was running at a high rate of speed." Rule 202, above quoted, does prohibit employees from jumping on or off trains and engines moving at a high rate of speed, and in addition, also prohibits employees from catching on to the front or rear end of an engine as it approaches them. The plaintiff himself, so far as the evidence discloses, had never been instructed to ride on the front end of an engine, nor does it appear that he had ever actually seen Rule 202, or any other rule of the company relating to the subject. In addition to that, all of the evidence relates to *riding* on the front end, and even Wesley Graves does not say that he was ever told to stand in front of a moving engine and undertake to mount the step as it approached him, and it is very clear

that he himself had seen and read the very rule which prohibits it. The plaintiff testified that he knew that railroads usually had rules. The rule referred to by him of other roads prohibiting employees from attempting to get on an engine going at a high rate of speed is evidently the same rule that this company has. When he speaks of "getting days" for not riding on the front end, he does not refer to the defendant company but to other companies that he had worked for, because every day from the time he entered the employ of this company to the day of the injury is accounted for, and there is no suggestion that this company ever "gave him days" for not riding on the front end. In addition to all of this, there is a very great difference between riding on the front end and standing in the middle of a track in front of an approaching engine and attempting to mount this small step while the engine is in motion. If an employee should get a footing upon this step while the train was standing still, it might not be dangerous for him to stand there and ride while the engine was moving at a low rate of speed, but the proposition is very different when he undertakes to mount the step while the engine is in motion. The evidence of the plaintiff as to "getting days" on other roads was clearly incompetent and should have been objected to and excluded, but since it has crept into the record it should not, in any way, militate against the defendant in this case. Confusion has crept into this record still further from the fact that some practices and customs of the Little Rock and Memphis Railroad have also been testified to in this case in such a way as to really make it appear that this company were connected with the same.

We respectfully submit that the judgment in this case should be reversed and that the cause should be dismissed for want of evidence to support it.

EDWARD B. PEIRCE,

Attorney for Plaintiff in Error.